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Race Relations Law Reporter

A Complete, Impartial Presentation of Basic Materials, Including:

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
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Summary of Developments . . .

Education

Exhaustion of state administrative remedies was required in a case arising in the federal court system in *South Carolina.* Negro children in that state had sought admission to public schools without regard to race or color. Following adverse action by the federal district court in which the case was brought, the Negro plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit. That court affirmed the action of the district court (p.519) on the ground that administrative appeals available to the plaintiffs under a recently-enacted *South Carolina* statute (p.586) had not been exhausted. Exhaustion of state administrative and judicial remedies was also being carried out in a school case in *North Carolina,* in which the North Carolina trial court dismissed, for improper joinder, the action of plaintiffs, some of whom had previously taken their case up through the federal court system (p.515).

The question whether a three-judge federal district court had jurisdiction was involved in other school cases in *North Carolina* (p.516) and *Tennessee* (p.519). In each of those cases it was determined that the case was properly within the jurisdiction of a single-judge district court. Integration of public schools in Logan County, *West Virginia,* within the next school year was ordered by a federal district court in that state (p.521) and in Hillsboro, *Ohio,* a federal district court, in a case remanded from a United States Court of Appeals, directed immediate integration of public schools in that city (p.518). An attack on the issuance of school bonds in *Florida,* made partly on the basis of segregation questions, was denied by the state supreme court which held that questions of segregation in the public schools were not material in considering the validity of an issue of school bonds (p.527). In *Tennessee* a state chancery court held that state appropriated funds could legally be spent in support of racially integrated state colleges and universities (p.523). Several county boards of education in *Maryland* acted to open admission to schools to all pupils without regard to race (pp. 604-607), as did cities in *Kentucky* (p.603). In Chattanooga, *Tennessee,* the school board announced the indefinite postponement of integration of the city schools (p.607). In *Arkansas* a state committee began action to have adopted by initiative petition a "pupil assignment law" (p.579). In *South Carolina* the General Assembly enacted legislation to confer rule-making and hearing authority on school boards (p.588) and to provide for appeals procedure from such action (p.586). In *North Carolina* a legislative advisory committee presented recommendations for legislative action in that state (p.581) with respect to the impact of the *School Segregation Cases.* The *Virginia* House of Delegates adopted a resolution with respect to racial segregation at school athletic events (p.589). In *Georgia* a state board rejected a proposal that retirement payments to teachers be discontinued on the basis of certain memberships or beliefs held (p.609).

Transportation

In an action which at the time was widely misinterpreted (see p.544), the United States Supreme Court dismissed as premature an appeal from a decision of the United States Court of Appeals for the Fourth Circuit involving the validity of segregation laws of *South Carolina* as applied to intrastate transportation by a local bus company (p.513). The Court of Appeals had reversed and remanded a decision of a federal district court in a case arising in that state, holding that the principle announced in the *School Segregation Cases* was applicable to and invalidated laws requiring segregation in intrastate transportation. The appeal to the United States Supreme Court had been taken prior to final action in the district court, however. In Montgomery, *Alabama,* the city bus line was enjoined from carrying out an announced policy (issued on the day of the Supreme Court action, above) of ceasing to enforce racial segregation on its city buses (p.534). The court, in granting the injunction, held that the state laws and city ordinances requiring such segregation were valid as a proper exercise of the police power of the state under the Tenth Amendment. Later, a federal court declared Alabama segregation statutes and ordinances requiring segregation on local buses unconstitutional in an opinion reported too late for inclusion in this issue.

Recreational Facilities

In *South Carolina* admission to a state park on a racially non-discriminatory basis was sought by Negroes in an action brought in a federal district court in that state. Prior to a decision in the case, however, the state legislature enacted a statute closing the park in question (p.590). The court thereupon dismissed the case as moot (p.528). The decision of a federal district court in *Virginia* requiring admission to a state park without regard to race or color, whether the park was operated directly by the state or leased, was affirmed on appeal by the United States Court of Appeals for the Fourth Circuit (p.530). Negroes were ordered admitted to a municipal swimming pool in St. Petersburg, *Florida* (p.531), and San Antonio, *Texas*, enacted an ordinance to end segregation in recreational facilities in that city (p.589). In Huntsville, *Alabama*, a city ordinance was passed providing for segregated use of the municipal golf course (p.589). The Supreme Court of *Ohio* affirmed a reversal by a state Court of Appeals of a lower court's injunction against denial to Negroes of admission to a private amusement park, holding that other state statutory remedies were adequate and exclusive (p. 546). In the *District of Columbia* the conviction of a corporate operator of bowling alleys of a violation of the District's non-discrimination law was affirmed by an appellate court (p.554) and the District commissioners issued an order confirming the application of that law to all of the District (p.590). The Attorney General of *New Jersey* issued an opinion exempting certain summer camps operated by religious institutions from that state's "Law Against Discrimination" (p.611).

Employment

Alleged racial discrimination in the operation of railway labor unions was involved in cases arising in federal courts in *Alabama* (p.558) and *Texas* (pp. 556, 561). In the Texas cases the courts dismissed the action as being within the primary jurisdiction of the National Railroad Adjustment Board. In the Alabama case an injunction and monetary damages were allowed.

Other Developments

A resolution of interposition to be voted on at the next general election was being circulated in *Arkansas* in the form of an initiative petition, drafted by a state commission (p.591). Activities of the National Association for the Advancement of Colored People were involved in court action in *Louisiana* (pp. 571, 576) and in legislative action in *South Carolina* (p.600). In *Mississippi* legislative action was taken to create a "State Sovereignty Commission" (p. 595). Additional civil rights legislation was being considered by the *United States Congress* (p.595). In *Texas* a federal district court ordered a restaurant operated under lease in a county courthouse to be opened to Negroes (p.532).

"State Action"

The Reference Section of this issue (p.613) contains a background article on the question of what constitutes "state action" against which rights are accorded under the Fourteenth and Fifteenth Amendments to the United States Constitution.

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REFERENCE

UNITED STATES SUPREME COURT

TRANSPORTATION
Buses—South Carolina

SOUTH CAROLINA ELECTRIC AND GAS COMPANY, a corporation v. Sarah Mae FLEMMING

United States Supreme Court, April 23, 1956, 351 U.S. 901, 76 S.Ct. 692.

SUMMARY: A Negro woman in South Carolina brought an action for damages under the Federal Civil Rights Act against an intrastate bus company. The suit was grounded on the action of an employee of the bus company, a bus driver, in requiring the plaintiff to change her seat on a bus in accordance with South Carolina's segregation law. The United States District Court where the action was brought dismissed the case on the ground that the state statute requiring segregation by race was valid. 128 F.Supp. 469 (1955). On appeal, the Court of Appeals, Fourth Circuit, reversed and remanded, applying the principle of the *School Segregation Cases* to intrastate transportation and holding that the District Court had jurisdiction under the Civil Rights Act, since the bus company, through its driver, was acting under color of state law. 224 F.2d 752, 1 Race Rel. L. Rep. 183 (1955). On appeal by the bus company to the United States Supreme Court, that Court dismissed the appeal in a Per Curiam opinion which stated:

"The appeal is dismissed. *Slaker v. O'Connor*, 278 U.S. 188."

The case cited by the Court in dismissing the appeal is a 1929 case in which the district court where the case was brought dismissed an action for lack of jurisdiction but allowed a broad appeal to the circuit court of appeals, which reversed and remanded the case for further proceedings. Prior to action on the remand order an appeal was allowed to the Supreme Court. The Supreme Court held that the appeal was premature because the judgment below was not final.

FAMILY RELATIONS
Marriage—Virginia

Ham Say NAIM v. Ruby Elaine NAIM

United States Supreme Court, March 12, 1956, 350 U.S. 985, 76 S.Ct. 472.

SUMMARY: A Chinese and a Caucasian left Virginia for North Carolina to be married in that state, in order to avoid the Virginia statute prohibiting marriage between persons of those races. Later a suit for annulment of the marriage was brought in a Virginia court, which annulled the marriage. On appeal, the Supreme Court of Appeals of Virginia held that the marriage was void by virtue of the Virginia miscegenation statute. 87 S.E.2d 749, 1 Race Rel. L. Rep. 219 (1955). On appeal to the United States Supreme Court, that court held that the constitutional issue of the validity of the Virginia statute was not squarely before it and remanded the case for clarification of the issues of the relationship of the parties to the state of Virginia at the time of the marriage. 350 U.S. 891, 76 S.Ct. 151, 1 Race Rel. L. Rep. 42 (1955). On receiving the order on remand the Supreme Court of Appeals of Virginia held that there was no provision in Virginia practice to reopen the case in the trial court and

adhered to its prior opinion. 90 S.E.2d 849, 1 Race Rel. L. Rep. 404 (1956). On motion to the United States Supreme Court to recall the mandate and set the case down for argument on its merits. that court denied the motion on the ground that the latter decision of the Supreme Court of Appeals of Virginia left the case devoid of a properly presented federal question.

PER CURIAM:

The motion to recall the mandate and to set the case down for oral argument upon the merits, or in the alternative, to recall and amend the mandate is denied. The decision of the Supreme Court of Appeals of Virginia of January 18, 1956, 197 Va. 734, 90 S.E.2d 849, in response to our order of November 14, 1955, 350 U.S. 891, 76 S.Ct. 151, leaves the case devoid of a properly presented federal question.

MISCELLANEOUS ORDERS
The United States Supreme Court:

Denied Certiorari (i.e., refused to review) in the following cases:

Board of Supervisors of L.S.U. v. Tureaud (Prior decision, 225 F.2d 434, 1 Race Rel. L. Rep. 101 (1955) in which the Court of Appeals, 5th Circuit, directed the admission of qualified Negro applicants to Louisiana State University.) 76 S.Ct. 780 (No. 777, May 7, 1956).

Board of Education of Hillsboro v. Clemons (Prior decision, 228 F.2d 853, 1 Race Rel. L. Rep. 311 (1956), in which the Court of Appeals, 6th Circuit, required the admission of Negro school children to public schools in Hillsboro, Ohio.) 350 U.S. 1006, 76 S.Ct. 651 (No. 711, April 2, 1956).

Lea v. Louisiana (Prior decision, 84 So.2d 169, 1 Race Rel. L. Rep. 392 (1955), in which the Supreme Court of Louisiana held that an allegation of racial discrimination in the selection of a grand jury because of alleged exclusion of Negroes therefrom was not a ground for reversal of a criminal conviction where no Negroes were involved in the trial), 350 U.S. 1007, 76 S.Ct. 655 (No. 567, April 2, 1956).

COURTS

EDUCATION
Public Schools—North Carolina

Albert JOYNER et al. v. The McDOWELL COUNTY BOARD OF EDUCATION.

Superior Court of McDowell County, North Carolina, March 5, 1956.

SUMMARY: In *Carson v. Board of Education of McDowell County*, 227 F.2d 789, 1 Race Rel. L. Rep. 70 (1955), the United States Court of Appeals for the Fourth Circuit had remanded a suit brought by Negroes in North Carolina seeking desegregation of schools in McDowell County of that state which had been dismissed in the federal district court. The remand order directed the district court to give consideration to North Carolina legislation providing for administrative remedies in school placement disputes (North Carolina Public Laws, 1955, Ch. 366; 1 Race Rel. L. Rep. 240). An action was subsequently brought in a state court of North Carolina involving some of the plaintiffs in the *Carson* case and others seeking admission of Negro pupils to schools in McDowell County without regard to race or color. The Court overruled a demurrer to the petition on the ground that it failed to state a cause of action but sustained a demurrer on the ground of misjoinder of parties and cause and dismissed the action. Both parties filed notices of appeal to the Supreme Court of North Carolina.

PATTON, J.

THIS CAUSE coming on to be heard at the regular February-March 1956 civil term of the Superior Court of McDowell County, North Carolina, and being heard by His Honor, GEORGE B. PATTON, Judge presiding, upon the Motion of the defendant to dismiss the Petition for failure of the petitioners to give notice of appeal within the time allowed by law, and upon the Demurrer of the defendant to the Petition for the reasons: (1) that it failed to state facts sufficient to constitute a cause of action, and (2) that there was a misjoinder of both parties and causes of action. And after hearing argument of counsel for defendant and counsel for petitioners, the Court being of the opinion that said Motion to Dismiss should be denied, and that said Demurrer should be overruled, insofar as it pertains to the failure to state a cause of action but, that said Demurrer as it relates to a misjoinder of parties and causes of action should be sustained;

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED:

(1) that the defendant's Motion to Dismiss this proceeding on account of the alleged failure of the petitioners to give notice of appeal within the time allowed by law is hereby denied.

(2) that the defendant's demurrer insofar as it relates to the failure of the Petition to state a cause of action be, and the same is hereby, overruled.

(3) that the defendant's demurrer to the Petition, upon the grounds that the Petition contains a misjoinder of parties and cause be, and the same is hereby, sustained, and this action is hereby dismissed.

(4) IT IS FURTHER ORDERED that the Petitioners pay the costs of this action to be taxed by the Clerk of this Court.

EDUCATION
Public Schools—North Carolina

Helen COVINGTON et al. v. MONTGOMERY COUNTY SCHOOL OFFICIALS

United States District Court, Middle District, North Carolina, April 7, 1956, 139 F. Supp. 161.

SUMMARY: An action was brought against officials of the Montgomery County, North Carolina, public schools in federal district court seeking admission of Negroes to public schools without regard to race or color. The single-judge court initially refused to constitute a three-judge court to hear the case. The motion to constitute a three-judge court was renewed and the court heard argument on that question. The court held that a three-judge federal district court has jurisdiction of a suit only where it is sought to have a state statute declared unconstitutional and to restrain the action of officers of the state in their enforcement of the statute. The court further held that the decision of the United States Supreme Court in the *School Segregation Cases* had already rendered state constitutions and statutes requiring racial segregation in public schools unconstitutional. Therefore, a requisite of jurisdiction for a three-judge court was absent. The case was set down for hearing on the merits by the single-judge court.

HAYES, District Judge.

On September 7, 1955, this court refused to constitute a three-judge court under Section 266 of the Judicial Code as amended, 28 U.S.C. 2281, for that the pleadings at that time did not show that the defendants were state officers and undertaking to enforce state statutes or orders of a state board or commission.

An amendment to the complaint has been made which now alleges that the defendants maintain certain schools for white children exclusively and other schools exclusively for Negro children and that in the performance of these acts the said defendants are acting pursuant to the direction and authority contained in the state constitutional provisions, state statutes, state administrative orders and legislative policy and, as such, are officers of the State of North Carolina enforcing and executing state statutes and policies.

The complaint originally prayed for a permanent injunction against the defendants preventing them from maintaining separate schools for white and colored children pursuant to Article IX Section 2 of the Constitution of North Carolina and alleging that the section violated their rights secured to them under the 14th Amendment to the Constitution of the United States. Later plaintiffs amended the complaint and it now asks that the portion of the state constitution requiring separate schools for the two races be declared null and void and that the defendants be permanently enjoined from the enforcement of any law or State order forcing segregation in the public schools.

Plaintiffs filed a petition with the defendants in September, 1954, asking for desegregation. The Summons was issued July 29, 1955.

[*Jurisdiction of Three-Judge Court*]

If this case is one falling within the provisions of Title 28 USCA 2281, then a single district judge has no jurisdiction to try it. If it is properly a case for a three-judge district court, any action by a single district judge will be nullified by the Circuit Court of Appeals. If a three-judge district court is convened when not coming within the provisions of Section 2281, the United States Supreme Court will take judicial notice of a lack of jurisdiction and remand and vacate any decree of such improperly constituted court. Rorick v. Commissioners, 307 U.S. 208; Spielman Motor Co. v. Dodge, 295 U.S. 89, 92. It is, therefore, necessary, if possible, to determine at the outset whether to convene a three-judge district court.

In Ex parte Public Bank, 278 U.S. 101 at 104, it is held that two things must concur to give the three-judge court jurisdiction: "(1) the suit must seek to have a State Statute declared unconstitutional, or that in effect, and (2) it must seek to restrain the action of *an officer of the State* in their enforcement of such statute."

By the amendment to the complaint, the plaintiffs have alleged facts to show that the defendants are acting in a true sense as officers of the State in respect to public elementary and high schools. While their area of activity is confined to Montgomery County, nevertheless they are doing in their county precisely

what similar officials in each of the other 99 Counties are doing; they are administering the state free public school system. A suit to restrain enforcement of the statewide school law, applicable alike in each county of the state, although against only these officials in Montgomery County, is in reality a suit against state officers. They are not enforcing the school law of Montgomery County but the school law of North Carolina in Montgomery County. Spielman Motor Co. v. Dodge, supra.

[*North Carolina Law*]

We must take judicial notice of the state law. The Montgomery school officials are appointed (elected) by the Legislature of North Carolina and are paid by the state; they expend for the state the school funds of the state allocated to Montgomery County. There can be no real doubt that they are acting as officers of the state and therefore meet one of the tests for determining the requisites of the jurisdiction of a three-judge court.

Next, a re-examination must be made to determine if a real controversy is presented as to the constitutionality of the state constitution, statutes or orders of state Boards compelling segregation in the public schools of the state.

[*Constitutionality of State Laws*]

It is true that the State of North Carolina was not a party actually (although the Attorney General was permitted to file briefs) in Brown v. Board of Education, 347 U.S. 483, 349 U.S. 294. After holding in the first case, decided May 17, 1954, that segregation of white and Negro children in the public schools of the state solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment, permission was granted the attorneys general of the states requiring or permitting segregation in public education to appear as *Amici Curiae* and to submit briefs. The Attorney General of North Carolina appeared, filed briefs and made oral argument. In the opinion filed May 31, 1955, 349 U.S. 294, it is said: "The opinions declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state or local law requiring or permitting such discrimination must yield to this principle." The validity of that part of the North Carolina Constitution requiring separate schools for the two races is no longer the subject of legal controversy. Nor is any statute—state or local— or order of a board compelling segregation in the public schools, a legal controversy now. Every judge in the land, state and federal, is required under oath to uphold the Constitution of the United States as the supreme law of the land. In the administration of the law by the courts every judge is likewise bound by the constitution as last interpreted and construed by the Supreme Court of the United States. If that court is not the final authority in legal proceedings, then where shall we look for the meaning of the Constitution. It is binding on this court and will be faithfully followed to the best of the ability of this Court as now constituted. Briggs. v. Elliott, 132 Fed. Supp. 776.

If, then, the state constitution or statutes or orders require that separate schools for the races must be maintained, it follows as the night the day that, being in conflict with the Constitution of the United States as defined by the Supreme Court, they are to that extent, null and void. No three-judge court is necessary to make that declaration. In the recent case from North Carolina of Frasier v. Trustees of the University of North Carolina, decided the 16th day of Sept., 1955, 134 Fed. Supp. 589, defended by the Attorney General of North Carolina, in connection with the opinion in Brown v. Education, supra, it is said: "The only answer to this far reaching decision, and the only defense on the merits of the cases offered by the defendants in this suit, is that the Supreme Court in Brown v. Board of Education of Topeka, Kansas, decided that segregation of the races was prohibited by the Fourteenth Amendment only in respect to the lower public schools and did not decide that the separation of the races in schools on the college and university level is unlawful. We think that the contention is without merit. That the decision of the Supreme Court was limited to the facts before it is true, but the reasoning on which the decision was based is as applicable to schools for higher education as to schools on the lower level." An appeal was taken to the Supreme Court which affirmed the judgment below, during March, 1956, not yet in the reports. There can be no doubt that the authorities cited above render null and void any law in this state com-

pelling the segregation of the races—whether in the schools for higher education or on the lower level.

[*Duty of Court*]

If the defendants are discriminating against the plaintiffs, it will be the duty of a one-judge district court to hear and to determine the facts. If it is ultimately determined that they are, such acts can not be defended on the ground that the state constitution, or statutes or orders of the state board compel it, for the obvious reason that Brown v. Board, supra, and Frasier v. Trustees, supra, have already declared that such laws and orders must yield to the Fourteenth Amendment which as they interpret it bars such discrimination.

The motion to constitute a three-judge court is denied and the case is set for hearing on the merits at Greensboro, N. C., April 26, 1956 at 10 A.M.

EDUCATION
Public Schools—Ohio

Joyce Marie CLEMONS, an infant, by Gertrude Clemons, her mother and next friend, et al. v. The BOARD OF EDUCATION OF HILLSBORO, Ohio, et al.

United States District Court, Southern District, Ohio, April 11, 1956, Civ. No. 3440.

SUMMARY: The plaintiffs, Negro school children in Hillsboro, Ohio, brought an action in the United States District Court, Southern District, Ohio, against the Board of Education and other school officials of that city, seeking to enjoin the officials from enforcing an alleged policy of racial segregation in the city schools. In an opinion rendered after the decision of the United States Supreme Court in the *School Segregation Cases*, but before the 1955 decision on enforcement, the district court denied the relief. The denial was on the grounds that an injunction would "disrupt the orderly . . . administration of . . ." the schools. On appeal, the United States Court of Appeals, Sixth Circuit, reversed, holding that it was an abuse of discretion for the district court to refuse to issue the injunction. 228 F.2d 853, 1 Race Rel. L. Rep. 311. The United States Supreme Court refused to review this decision. .....S.Ct.....(1956). On the remand the district court directed full and immediate compliance with the decision of the Court of Appeals, setting September, 1956, as the time by which racial segregation was to be ended.

DRUFFEL, District Judge.

Defendants, The Board of Education of Hillsboro, Ohio, et al., will take notice that this court is now in receipt of a mandate from the United States Court of Appeals for the Sixth Circuit, directing this court to give full force and effect to its decision in the above entitled case, which decision provides among other things to frame a decree which will provide for the immediate admittance to school on a nonsegregated basis of school age Negro children not now in any Hillsboro public school, and which will further provide for the end of all racial segregation in the Hillsboro public schools on or before the commencement of the school year in September, 1956.

Since the United States Supreme Court has refused to review the decision of the United States Court of Appeals the above directive constitutes the law of the case. By reason whereof, it is ordered and decreed by this District Court that defendants, The Board of Education of Hillsboro, Ohio, et al., immediately and fully comply with the foregoing decision and directive of the Court of Appeals.

In the opinion of this court since defendants have announced they will not seek a rehearing before the Supreme Court, and will abide the decision of the Court of Appeals, this makes unnecessary another hearing between the parties.

This court will retain jurisdiction pending full compliance with the Court of Appeals decision.

EDUCATION
Public Schools—South Carolina

Woodrow W. HOOD et al. v. BOARD OF TRUSTEES OF SUMTER COUNTY SCHOOL DISTRICT NO. 2, Sumter County, South Carolina, et al.

United States Court of Appeals, Fourth Circuit, April 25, 1956, No. 7163.

SUMMARY: Negro school children in Sumter County, South Carolina, brought an action in federal district court against school officials of that county seeking an injunction against alleged denial of admission to public schools solely on the basis of race or color. The district court denied a motion by plaintiffs for summary judgment (which was treated by the Court of Appeals as a denial of injunctive relief). On appeal the Court of Appeals affirmed on the ground that the plaintiffs had not exhausted their administrative remedies afforded by Act No. 662, Acts and Joint Resolutions of South Carolina, 1956 *(infra*, p. 586).

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

PER CURIAM:

This is an appeal from the denial of a motion for summary judgment in an action by school children for an injunction to prevent discrimination on the ground of race. As the denial of motion for summary judgment is not a final judgment in the case, we can entertain the appeal only by considering the denial of the motion as a denial of injunctive relief. So considered, the order denying such relief must be affirmed, as the administrative remedies prescribed by the recent South Carolina statute* have not been exhausted. Carson v. Board of Education of McDowell County 4 Cir. 227 F.2d 789. As plaintiffs were not entitled to injunctive relief for this reason, we affirm the order in so far as it denies an injunction, without passing upon other questions raised in the case or approving the reasoning of the court below in denying the motion for summary judgment.

Affirmed.

*Act No. 55, Acts and Joint Resolutions of South Carolina of 1956.

EDUCATION
Public Schools—Tennessee

Robert W. KELLEY, et al. v. BOARD OF EDUCATION OF THE CITY OF NASHVILLE, Davidson County, Tennessee, et al.

United States District Court, Middle District, Tennessee, March 28, 1956, 139 F.Supp. 578.

SUMMARY: White and Negro patrons of public schools in Nashville, Tennessee, filed an action in federal district court seeking an injunction to require admission of children to public schools in that city without regard to race or color. A motion to constitute a three-judge district court was granted. The court determined that, as the unenforceability of the constitution and statutes of Tennessee with respect to separate schools was conceded by the defendants, it did not have jurisdiction and remanded the case to a single-judge court. The court further found that the board of education was proceeding in good faith toward integrating the schools and granted a continuance to the next term of court.

Before MARTIN, Circuit Judge, and DAVIES and MILLER, District Judges.

PER CURIAM:

The undersigned three-judge District Court, having been duly assembled in compliance with the complaint filed in this case, has this day heard and considered arguments in open court on the motion of attorneys for the defendants for a dissolution of this three-judge court and for a remand of the cause to a single district judge for trial, upon the grounds that Section 2281 of Title 28, United States Code, is not applicable and that, accordingly, a three-judge court does not have jurisdiction.

The same position taken by defendants in the foregoing motion was also taken by defendants in the answer filed in the cause, and also in open court on argument of the motion. Therefore, it is obvious that no necessity for the hearing of the cause by a three-judge District Court exists, since the unenforceability of the Constitution and Statutes of Tennessee has been conceded by defendants. The motion to dissolve the three-judge District Court is, therefore, granted, and the case is remanded to be heard by a District Judge.

This Court has also considered the second ground of the motion of defendants argued today that the case should be continued to afford the Board of Education of the City of Nashville an opportunity to formulate a plan in compliance with the principles announced by the Supreme Court in Brown v. Board of Education, 347 U. S. 483.

In the second opinion in Brown v. Board of Education, 349 U. S. 294,299, 300, 301, the Supreme Court said:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. * * *"
>
> "* * * Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.
>
> "While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases."

It further appearing to the Court that the Board of Education of the City of Nashville announced at an early date that it would comply with the ruling of the Supreme Court in integrating the public schools of Nashville and has proceeded promptly to take steps toward that end, and is now acting in good faith and with appropriate dispatch in awaiting the taking of the school census and giving careful consideration to all factors involved, so as to arrive at a workable plan of integration, which appears to be a reasonable start toward full compliance with the May 17, 1954, ruling of the Supreme Court, it is, therefore, ordered that the application for a continuance is granted, and the cause is continued until the next term of court.

EDUCATION
Public Schools—West Virginia

Teddy R. SHEDD, an infant, by his next friend, Willie Shedd, et al. v. The BOARD OF EDUCATION OF THE COUNTY OF LOGAN, a corporation, et al.

United States District Court, Southern District, West Virginia, April 11, 1956, Civ. No. 833.

SUMMARY: Negroes in Logan County, West Virginia, brought an action in federal district court against school officials seeking to require their admission to public schools of that county without regard to race or color. At a pre-trial conference it was admitted that the West Virginia constitutional and statutory provisions requiring racial segregation in schools were void and unenforceable. The school officials submitted a plan calling for partial integration beginning with the 1956 school term. The Court in effect, directed that the plan be put into effect and that complete integration of the schools be accomplished by the second school term of the 1956-57 session, retaining jurisdiction of the case in order to supervise the implementation of its instructions.

WATKINS, District Judge.

This cause came on to be heard on the 6th day of April, 1956, in the United States District Court for the Southern District of West Virginia, Huntington, West Virginia, upon the complaint of the plaintiffs duly and regularly filed, the Answer of the several defendants, and the plaintiffs appearing by their attorneys T. G. Nutter and Willard L. Brown, and the defendants appearing in person and by their attorneys, Claude A. Joyce and William F. Lockhart, the judge of said court did proceed to conduct a pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure, and at such conference the Court proceeded to hear the respective parties and the argument of counsel as to when segregation on account of race in the schools of Logan County should be abolished.

[*Findings of Law and Fact*]

As a result of such conference the Court finds as follows:

1. The plaintiffs and each of them are negroes and citizens of the United States and the State of West Virginia. They are residents of Logan County, West Virginia. Adult plaintiffs not applicants are parents of infant plaintiffs, applicants.

2. That this Court has jurisdiction of the subject matter and all persons and parties hereto, and that the complaint states a cause against the defendants under the Fourteenth Amendment of the Constitution of the United States, and Section I, Title 28, United States Code, Section 1343, under Title 42, United States Code, Section 1981 and 1983, under Title 28, United States Code, 2281 and under Rule 23 (a) of the Federal Rules of Civil Procedure.

3. Article XII, Section 8 of the Constitution of West Virginia, and Section 1775 (18-5-14) Michie's West Virginia Code of 1955, require the segregation of white and negro students in all the public schools of the State of West Virginia, but said constitutional and statutory provisions are, and are conceded by defendants to be, unconstitutional because they are in conflict with provisions of the Constitution of the United States.

4. Defendant Paul C. Winter is County Superintendent of Schools for Logan County, West Virginia. Defendants W. E. Bivens, Earl Justice, Joe Blair, French Workman and Woodrow Gordon constitute the Board of Education of the County of Logan.

5. At the conclusion of such pretrial conference the judge of said court made the following statement into the record:

[*Board Agreement*]

The Board of Education of Logan County has agreed to completely desegregate the elementary grades one (1) to six (6) inclusive in Logan County, West Virginia, at the beginning of the school year in September, 1956, and to give any student eligible to enroll in those grades the right and opportunity to enroll in any school of his choice within his attendance area, and such students so eligible to enroll in such grades shall be accepted by such schools without racial discrimination.

I am of the opinion that there does not seem to be any basis for any racial discrimination in Logan County, so the conclusion that I reach is that the classes as they exist now in all the schools shall not be disturbed. If in any of the junior high schools or senior high schools in Logan County there is room for more pupils to be admitted during the coming semester beginning in September, 1956, or even right now, at any time that there is room in such junior and senior high schools for other pupils to be admitted and pupils from that attendance area, whether they are white or colored, wish to be admitted to such schools that they should be admitted. If they wish to be admitted and there is not room, then without regard to race or color they should be given the right to come into those schools if and when there is room on a basis of first come first served. That is the situation as it should be viewed during the present semester of this school year and the next semester which begins in September, 1956.

[*Dates to Commence Integration*]

I see no obstacle to the complete freedom of pupils to be admitted to all schools of Logan County, West Virginia, at the beginning of the second semester of the school year 1956-57, which ordinarily begins in the latter part of January or early February, on an indiscriminate basis just by the establishment of attendance areas and of permitting pupils from those areas to attend the schools that are convenient to those areas. That is my conclusion with reference to the situation which should prevail after the first semester of the 1956-57 school year. At present and during the semester beginning September, 1956 there should be admission of any pupils who are properly allocated in the proper attendance areas without discrimination if they wish to be admitted and if the schools are sufficiently uncrowded to admit them, and then at the beginning of the second semester of the 1956-57 school year arrangement for the elimination altogether of any discrimination or segregation should be made.

[*Reason For Delay*]

The reason for the delay in the complete desegregation of the junior and senior high schools of Logan County is due to the fact that the Board of Education has now embarked upon an extensive building program which will add greatly to the facilities of education for both the white and negro students of that county. It appears that two beautiful high schools, one at Man and one at Logan, West Virginia are now being erected at a cost of several million dollars and that these schools will likely be completed and ready for occupancy at the beginning of the second semester of the 1956-57 school year, and that when these schools are completed it is the plan of the Board of Education to house substantially all of the high school students of Logan County in these new buildings, and to use the present high school buildings for the junior high school students of Logan County. This will mean a complete change for all of the junior and senior high school students of Logan County as soon as these new buildings are completed. If complete desegregation of the junior and senior high school students was effected with the beginning of the next semester it would mean that many of the students, particularly the negro students, would be moving in a new school building at the beginning of the next semester and then would be required to move again into another building the semester following. Since the buildings will likely be completed as stated above it is deemed to be in the best interests of all the junior and senior high school students, both negro and white, to bring about this change and integration of the school system by making one instead of two transfers.

Should the construction of these buildings be delayed because of some unforeseen hazard or emergency such that the buildings would not be ready for occupancy at the beginning of the second semester of the 1956-57 term, the court reserves the right for good cause shown to make such change in this order as justice requires.

[*Retention of Jurisdiction*]

It is further ordered that this court will retain jurisdiction in this proceeding and that this matter be continued generally until the recommendations of the court for desegregation of schools of Logan County, West Virginia, shall have been fully completed and complied with.

At a meeting of the Board of Education of Logan County, West Virginia, held at Logan, West Virginia, on Tuesday, the 10th day of April, 1956, the above order was approved; a copy of the resolution approving same being attached hereto and made a part of the record in this case.

EDUCATION
Colleges and Universities—Tennessee

Donald DAVIDSON et al. v. Quill E. COPE et al.

Chancery Court, Part II, Davidson County, Tennessee, May 7, 1956, No. 77014.

SUMMARY: Plaintiffs, as citizens and taxpayers of the state of Tennessee, sought a declaratory judgment against the state Commissioner of Education and other state officials to declare that there was no authority to disburse appropriations from the state for the support of colleges or universities which did not comply with the Tennessee constitutional and statutory provisions requiring racial segregation in public educational institutions. In June, 1955, the state Board of Education of Tennessee had adopted a resolution providing for gradual integration of certain state colleges (see 1 Race Rel. L. Rep. 262), and in *Booker v. Board of Education,* .....F.Supp....., 1 Race Rel. L. Rep. 118 (1955) the United States District Court for the Western District of Tennessee had held that the Tennessee constitutional and statutory provisions requiring segregation in public educational facilities were void. The Court held that the appropriations made by the 1955 session of the Tennessee legislature were made in the light of the decision of the United States Supreme Court in *Brown v. Board of Education,* 347 U.S. 483, 1 Race Rel. L. Rep. 5 (1954), and the legislature impliedly authorized the use of such appropriations in non-segregated schools.

WADE, Chancellor.

The bill as amended and supplemented was filed in this cause by Donald Davidson and others, as citizens and taxpayers of the State of Tennessee, against Quill E. Cope, Chairman of the Board of Education and Commissioner of the Department of Education of the State, members of the State Board of Education, Presidents of Austin Peay State College and East Tennessee State College, the Director of Accounts for the State, the State Treasurer, the Governor, and the Attorney-General of the State of Tennessee.

The purpose of the bill was to obtain a declaratory judgment to the effect that the State of Tennessee has no authority to disburse money from the State Treasury for desegregated schools, on the ground that such disbursements are in violation of Article II, Section 24 of the State Constitution, which reads as follows:

> "No money shall be drawn from the Treasury but in consequence of appropriations made by law; . . ."

The bill alleges in substance that the General Assembly of the State of Tennessee, in its regular session of 1955, passed an act known as the "General Appropriations Bill," which is Chapter 229 of the Public Acts of that year, and a "General Education Law", which is chapter 136 of the Public Acts of said year wherein the respective sums of $554,000.00 and $770,000.00 were appropriated in each act for the operation and maintenance of Austin Peay State College and East Tennessee State College.

That by Chapter 6 of the Public Acts of 1955, the State Legislature enacted into law, as the official Tennessee Code, the "Tennessee Code Annotated," which by the terms thereof became effective as the statutory laws of the State of Tennessee, as of January 1, 1956.

That included in the Tennessee Code Annotated were Sections 49-3203, 49-3205, 49-3206, 49-3207, 49-3209, 49-3701–3703, all of which sections deal with prohibition of integrated public schools in the State.

That the statutory provisions contained in the foregoing enumerated Code Sections clearly evinced a legislative intent that all money appropriated under the General Appropriation Law, or the General Education Law, was to be expended only upon segregated schools, colleges, normals and universities.

[*Board Resolution*]

The bill states further that on June 15, 1955, resolutions were adopted by the State Board of Education permitting gradual integration on a graduate level for colleges under the jurisdiction of said Board, which plan and resolutions were submitted and approved by Federal Judge Marion S. Boyd in a case filed in the United States District Court for the Western District of Tennessee, at Memphis. That as a result of

the plan of desegregation, negroes have been admitted to Austin Peay State College and East Tennessee State College, and by reason of said admissions further expenditures by State authorities are unlawful and in violation of the Tennessee Constitution and statutes.

The bill prays that the Director of Accounts and the Treasurer of the State be enjoined from unlawful diversion of State funds and that the Presidents of the respective colleges be enjoined from accepting the funds so long as negroes attend classes in their institutions, and that said Presidents be enjoined from permitting negroes to further attend classes.

[*Defendants' Answers*]

The Governor moved to dismiss the bill as to him, on the ground that the Court was without jurisdiction to entertain the suit against the Governor of the State, and further that no relief was sought against him.

All of the other defendants demurred upon the grounds: (a) That the conduct complained of was engaged in on the part of said defendants because of the suit filed against them in the Federal Court at Memphis to enforce constitutional rights of certain persons mentioned in that cause, and that the defendants have acted in accordance with the decree of that Court, and in accordance with the Constitution of the United States, as interpreted by said Federal Court, and the Supreme Court of the United States; (b) because all of the acts complained of have been done in accordance with the requirements of the Constitution of the United States, and that to the extent that the statutes and Constitution of Tennessee are to the contrary, the latter are null and void; and (c) because the provisions of the statutes and Constitution of Tennessee relied on by complainants as the basis of their suit are contrary to the Constitution of the United States, particularly the Fourteenth Amendment thereof, and the same are null and void.

[*Constitutionality of State Laws*]

In the brief filed in behalf of complainants, it is stated that they will concede, for the sake of argument, that all segregation laws of the State of Tennessee, including a portion of Article XI, Section 12 of its Constitution, are unconstitutional as decreed by the United States Supreme Court, but, even so, they insist that there is still no authority for the payment of State funds to mixed schools. In the latter part of complainants' brief the position is taken that since the State segregations laws have never been declared unconstitutional by final decree of any Court that they are constitutional and that their constitutionality may not be attacked in this proceeding.

Since the demurrer of the defendants specifically and expressly raised the question as to the constitutionality of the Tennessee Constitution and statutes which provide for segregation, and in view of the insistence by the complainants that they are constitutional, this question must be determined by this Court.

First, attention should be called to what is known as the "Supremacy Clause" in the United States Constitution, which is found in Article VI, Section 2 thereof, and reads as follows:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Since the early landmark case of Marbury v. Madison, reported in 2 L. Ed., 136, and decided in 1803, it has been held that the United States Supreme Court has the power and authority to strike down laws which it interprets to be in conflict with the federal constitution. There are numerous Tennessee Supreme Court cases which recognize and apply the above announced principle. A comparatively recent one is that of Rowe v. International Brotherhood, 186 Tenn., 265, 269, wherein the Court states as follows:

> "The decision of the Supreme Court of the United States as to whether a certain act, decree, or law violates the Constitution of the United States is binding upon the state courts."

In a very recent case decided by the Supreme Court of Texas, being that of McKinney v. Blankenship, 282 S. W. (2d) 691, the identical question now being considered was passed upon and in so doing that Court stated as follows:

> "At the threshold of our consideration of the issues in this case we are met with the argument that since the constitutional and statutory provisions requiring segrega-

tion in Texas schools were not before the Supreme Court in the Brown case they were not condemned and we should hold them valid and enforceable. That proposition is so utterly without merit that we overrule it without further discussion, except to say that Section 2 of Article VII [sic] of the Constitution of the United States declares: 'This Constitution and the laws of the United States which shall be made in pursuance thereof. . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitutions or laws of any state to the contrary notwithstanding.'"

[*School Segregation Cases*]

In the now celebrated case of Brown v. Board of Education of Topeka, 74 Supreme Ct. Rep., 686; 347 U. S. 483, decided May 17, 1954, the Supreme Court of the United States overturned the long standing "separate but equal" doctrine pronounced in 1896 by the Court in Plessy v. Ferguson, 163 U. S., 537. In so doing the Supreme Court held that a State may not deny to any person, on account of race, the right to attend any publicly maintained school. In other words it eliminated compulsory segregation in public schools. It did not decide that States must mix persons of different races in schools, or that States must deprive persons of the right of choosing the schools they attend.

In a later decision, handed down May 31, 1955, by the Supreme Court of the United States, being that of Brown v. Board of Education of Topeka, and reported in 349 U. S. 294, 75 S. Ct., 753, implementing its former ruling, that Court in referring to the former Brown cases stated:

"These cases were decided on May 17, 1954. The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law, requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded."

The opinion goes on to state that in fashioning and effectuating integration decrees, the courts will be guided by equitable principles, which should be characterized by a practical flexibility in adjusting public and private needs. By said opinion, the lower courts were authorized to consider the adequacy of any proposed plan by those in authority to meet problems and effectuate a transition to a racially non-discriminatory school system, and that during the period of transition the courts would retain jurisdiction of the cases.

[*Effect of Supreme Court Decision*]

Under our form of government, where the written constitution, by its own terms, is the supreme law of our land, some agency of necessity must have the final word as to the validity of a statute or other law assailed as unconstitutional. The United States Constitution makes it clear that this power has been entrusted to the Supreme Court of the United States when the question arises in a controversy within its jurisdiction.

A State Constitution is a law within the meaning of the Federal Constitution, and when deemed violative of that instrument, is held unconstitutional by the Supreme Court of the United States. Gunn v. Barry, 15 Wall., 610, 21 L. Ed., 257; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 29 L. Ed., 516. The Brown case not only held unconstitutional state statutes, as to compulsory segregation, but it also held unconstitutional such provisions in the state constitutions of Virginia and South Carolina.

Regardless of any opinion which this Court may entertain as to the correctness or advisability of the conclusion reached by the United States Supreme Court in the Brown cases, supra, it has no choice under the "Supremacy Clause" of the Federal Constitution but to follow the holding in said cases to the effect that all laws of a state which require compulsory segregation are in violation of the equal protection of the laws clause of the Fourteenth Amendment to the Federal Constitution. This Court is, therefore, constrained to declare all such Tennessee segregation laws, including that portion of Article XI, Section 12 of its constitution dealing with the subject, to be invalid as a result of said Brown cases, supra.

Whether the rulings of the Supreme Court are disagreed with or subscribed to, they must be obeyed, or anarchy will result. If public schools are to be maintained there appear to be only two lawful methods of avoiding integration, neither of which is a likelihood. One is

for the United States Supreme Court to overturn its decision in the Brown cases, supra, and the other is by a Federal constitutional amendment expressly providing for segregation.

Having reached the conclusion that the portion of the Tennessee Constitution and statutes requiring segregation are invalid the Court will next pass upon the insistence of the complainants to the effect that regardless of the invalidity of the segregation laws it was the intention of the legislature in the enactment of the 1955 General Appropriation and Education Laws that money should be appropriated only to segregated schools.

Complainants take the position that there is no authority of any kind whereby any funds may be appropriated to desegregated or integrated public schools. In support of this position, it is argued that by virtue of the 1956 Code, authorized by Chapter 6 of the Public Acts of 1955, statutes requiring segregation were adopted, and that the General Appropriations Act and General Education Act, passed in March of the 1955 Legislative Session, must be construed *in pari materia* with pertinent education laws to the end that it be declared that the legislative intent was that all appropriations were made only to segregated public schools.

[*Intent of Legislature*]

Looking first to see what the Legislature did when it authorized a codification of its previous enactments it is found that section 1-108 of the 1956 Code placed limits upon the authority of the Code Commission and provided that it "shall not alter the sense, meaning or effect of any act of the General Assembly, but shall copy the exact language of the text of the statutes, codes and session laws of a public and general nature in Tennessee. . ." Under said section the Commission was further authorized to rearrange, regroup and renumber the titles, chapters, section, et seq., but it was not permitted to enact new laws or to alter the old in any sense. It has been held in Tennessee in the case of Roberts v. Cahill Forge & Foundry Company, 181 Tenn., 688, that original acts of a legislature could be looked to in construing and clarifying a code adopted by a subsequent legislature. This plainly implies that the adoption of a code is not to be construed as an original legislative enactment, and this Court so holds.

With the knowledge of the first Brown decision (May 17, 1954) but imputable to all members of the 1955 Legislature, they saw fit to enact the General Education Law on March 2, 1955, and the General Appropriation Act on March 16, 1955. Both of these acts were complete within themselves. Nowhere in either act are the appropriations to schools and colleges limited to those which were segregated. It is not reasonable to say that the Legislature would not have passed these acts unless they had been assured that the segregation laws which had been rendered invalid would or could be lawfully enforced.

[*Effect of Brown Decision Imputable*]

The Court is not here required to speculate as to whether or not the legislature would have passed the General Appropriations Act and the General Education Act if it had known the segregation laws would have been declared invalid. The legislature knew that our segregation laws (which had only been included in 1956 Code by its codifiers) were invalid, and if it had been its intent to make the appropriations acts dependent on the segregation laws it could have readily provided as much in the respective acts. This it did in neither act. The Court is morally certain that the 1955 Legislature never intended to abolish the public school system in the State, and this would necessarily have to be held if the complainants' insistence is to be followed. It results that this Court cannot construe either Chapter 136 (General Education Act) or Chapter 229 (General Appropriation Act) of the 1955 Public Acts to embody a legislative intent that State funds were to be expended only on compulsory segregated schools.

Still another insistence of the complainants is that the Board of Education was without authority in law, express or implied, to adopt a plan calling for gradual desegregation in schools on a graduate level.

The Resolution adopted by the Board sets forth as a part of its preamble a portion of the opinion in the second Brown case, supra, as follows:

> ". . . . . Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities

constitutes good faith implementation of the governing constitutional principles . . . ."

If integration must be had in the State's graduate schools, certainly the State Board of Education as constituted and created by statute, is the logical body to plan and supervise such procedure.

While this Court considers it to be immaterial, in so far as this litigation is concerned, as to whether or not the Board has authority, it is without a doubt, most fortunate for all parties concerned that it has assumed authority and is acting accordingly. One does not have to think twice to realize what chaos and turmoil would have resulted if the Board had not taken upon itself this obligation.

Since the court is of the opinion that the demurrer must be sustained and the bill dismissed as to all demurrants, it will likewise be dismissed as to the Governor, and his motion will be sustained.

A decree will be entered in accordance with the foregoing opinion.

EDUCATION
School Bonds—Florida

State of FLORIDA et al. v. SPECIAL TAX SCHOOL DISTRICT NO. 1 OF DADE COUNTY, FLORIDA

Supreme Court of Florida, March 26, 1956, 86 So.2d 419.

SUMMARY: This suit involved the validation of school bonds in Dade County, Florida. The state circuit court where the suit was brought validated the bonds in question. On appeal to the Florida Supreme Court, a contention was made that the bonds could not be validated without providing for compliance with the Florida constitutional provision requiring separate white and colored schools. The court held that the question of whether the funds obtained could be used for the construction or maintenance of non-segregated schools was not material in considering the validity of the bonds. A portion of the opinion of the Court, by TERRELL, J., follows:

* * *

The third and last point presented is whether or not Special Tax School District No. 1, Dade County, is authorized by Chapter 236, Florida Statutes, and Section 17, Article XII, Florida Constitution, to issue the proposed bonds for the school purposes indicated without providing for compliance with Section 12, Article XII, Constitution of Florida.

Chapter 236, Florida Statutes 1955, defines the procedure for issuing special tax school district bonds. It is shown that the required procedure was followed in this case with reference to segregated schools. In voting for the bonds the freeholders had in mind the extreme necessity for the contemplated improvements as disclosed by the record. In our view the segregation question has no place in this discussion or bond issue. The question before the voters was one of urgent school necessity and the qualified electors voted for the bonds to provide better school facilities for that reason and no other. The pressing necessity for better school facilities was revealed by the record and the bond issue was overwhelmingly approved on that basis. Any reasonable pattern for desegregation that may be approved in the future will still require more and better school facilities which can be taken care of when that contingency arises. To drag it into the picture at this time is beside the question. Board of Public Instruction vs. State (Fla.), 75 So. 2d 832; Matlock vs. Board of County Commissioners (Okla.), 281 P. 2d 169.

The decree appealed from is therefore affirmed.

Affirmed.

DREW, C. J., THORNAL, J., and PRUNTY, Associate Justice, concur.

GOVERNMENTAL FACILITIES
Parks—South Carolina

Etta CLARK et al. v. C. H. FLORY et al.

United States District Court, Eastern District, South Carolina, April 19, 1956, Civ. No. 5082.

SUMMARY: Negroes in South Carolina brought a class action in federal district court seeking a declaratory judgment as to their right to use the facilities of Edisto Beach State Park in Charleston County, South Carolina, on a racially non-discriminatory basis. Subsequently the South Carolina Legislature ordered the State Commission of Forestry to close the park in question and it was closed to members of both races on February 7, 1956. The Court held that, as the park was closed and could be reopened only by an act of the legislature, the case was moot and dismissed the complaint.

WILLIAMS, District Judge.

The summons and complaint in this action were served on the defendants on or about July 23, 1955. The complaint asked for declaratory judgment setting forth the rights of the plaintiffs, who are Negroes, to use Edisto Beach State Park which is located in Charleston County, South Carolina. It is claimed that the plaintiffs were denied the use of the park's facilities solely on account of race and color, under the customs, policies, usages and practices of the defendants, in violation of the Fourteenth Amendment of the United States Constitution.

Before the defendants answered, plaintiffs served an amended summons and complaint, dated August 9, 1955, which was practically identical to the original complaint except that it refers to Sections 181, 182, 183 and 184 of Title 51 of the 1952 Code of Laws of South Carolina which prohibited the use of the parks and beaches by members of both the colored and white races in any county in South Carolina having a city with a population of more than sixty thousand persons, according to the 1930 census of the United States. The Act applies only to Charleston County, and Edisto Beach State Park is the only park involved in this suit.

[*Park Closed*]

Several hearings were held before me. Before a final decision was reached, the Legislature of South Carolina ordered the State Commission of Forestry to close Edisto Beach State Park. The Edisto Beach State Park was closed to members of both races on the 7th day of February, 1956, and has remained closed since that date. It cannot be reopened except by an Act of the South Carolina Legislature.

The questions presented in this case are:

(1) Are Sections 181, 182, 183, 184, Title 51, of the 1952 Code of Laws of South Carolina which prohibits the use of the Edisto Beach State Park to both colored and white races constitutional?

(2) Is this a class action?

Since the Edisto Beach Park has been closed by an Act of the Legislature and cannot be reopened except by another Act of the Legislature, there is no question for the Court to pass upon. A declaratory judgment is never granted unless there is an actual living controversy before the Court. This controversy must be real and substantial. Declaratory judgments are not granted unless by granting them controversies will be ended. The following is taken from the case of Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 97 L.Ed. 291:

> "For more reasons than one it is clear that this proceeding cannot result in an injunction on constitutional grounds. In addition to defects that will appear in our discussion of declaratory relief, it is wanting in equity because there is no proof of any threatened or probable act of the defendants which might cause the irreparable injury essential to equitable relief by injunction."

[*No Controversy*]

In the instant case there is no present necessity for any judgment for there is no controversy. Edisto Beach State Park has been closed to all.

No one contends that this Court has the power to require the State of South Carolina to operate any park. This Court cannot by

mandamus order the reopening of the closed park. If it enjoined the defendants from operating a segregated park, it would be doing a futile thing, as there is no park in operation in Charleston County at the present time, nor is there any immediate prospect that the Edisto Beach State Park will be in operation.

The hearings which have heretofore been held developed the fact that the State Commission of Forestry is in control of the parks and beaches owned by the State of South Carolina. The State Forestry Commission is not before this Court, and no judgment of this Court would be binding upon it. This matter was called to the attention of the plaintiffs by the defendants, and the defect could have been cured by bringing the proper parties before the Court. The plaintiffs have not brought the proper parties before the Court, and a declaratory judgment would therefore be a futile thing.

Our own Fourth Judicial Circuit Court decided in the case of Michael v. Cockerell, 161 F.2d 163, that Federal Courts have no power under Article III of the Constitution to render advisory opinions or to decide in advance constitutional issues not based on present necessity therefor. Concrete legal issues must be presented in actual cases. A Federal Court must always be alert to prevent futile and premature declaratory judgments.

[*Power to Reopen Park*]

Plaintiffs now contend that a declaratory judgment should be issued because the Legislature can order the reopening of the park for the use of whites only, and that before an order could be secured to protect the rights of the Negroes, the Legislature could again order the parks closed. I cannot, and will not, assume that the Legislature of South Carolina would do such a thing. I can only assume that the Legislature meant what it said when it closed the Edisto Beach State Park. It would be a reflection on the honesty and integrity of this honorable body to assume that they would open and close the park at its discretion and thereby circumvent the rights of the plaintiffs and other Negroes to use the park. Since the Legislature must act on this matter, it would certainly take a substantial length of time to reopen the park. This case is unlike the Virginia case of Tate v. Department of Conservation and Development, 133 F.Supp. 53, and the cases therein cited, including Lawrence v. Hancock, 76 F.Supp. 1004. In the Lawrence case, the City of Montgomery, West Virginia had leased a swimming pool to parties who allowed only white persons to use it. An action was brought by some Negroes to be allowed to use the same pool, whereupon the City immediately closed it. In that case the City had control of the pool and could open and close it at any time. In the Tate case, the Virginia Department of Conservation and Development ran the Virginia park under its rules and regulations and could close it by administrative order. The District Judge granted a declaratory judgment in that case because he found that there was an immediate necessity for the order because the park could be reopened at any time by order of the Department. I do not find there is an immediate necessity for an order because no one except the Legislature of South Carolina can reopen the park. By pressing for judgment at this time, the plaintiffs are asking the Court to rule on a matter which is moot, hypothetical, is not necessary and is contrary to the principles which have been declared by the Supreme Court of the United States.

[*Constitutionality of State Laws*]

I do not think, however, it would do any harm for me to state that the State of South Carolina, during the hearings which have been held, admitted Sections 181, 182, 183 and 184 of the 1952 Code of Laws of South Carolina were unconstitutional. I announced during the hearing that this was my opinion. The only question to be passed upon, therefore, is whether this is a class action. I do not feel that there is any necessity of issuing a declaratory judgment on this point since the park is closed and no question of the rights of the plaintiffs can arise until the park is opened by Legislative action. It is, therefore,

ORDERED that the complaint herein be dismissed.

GOVERNMENTAL FACILITIES
Parks—Virginia

DEPARTMENT OF CONSERVATION AND DEVELOPMENT, Division of Parks, of the Commonwealth of Virginia, et al. v. Lavina G. TATE, et al.

United States Court of Appeals, Fourth Circuit, April 9, 1956, No. 7129.

SUMMARY: Negro citizens of Virginia brought an action in federal district court against officials of the state park system alleging denial of access to state parks based on race. The action sought a declaratory judgment and injunctive relief. The district court issued the injunction and added that if the park in question, or a part of it, was leased to private operators the state must require that there be no discrimination in its operation. 133 F.Supp. 53, 1 Race Rel. L. Rep. 171 (1955). On appeal the United States Court of Appeals for the Fourth Circuit affirmed.

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

PER CURIAM.

This is an appeal in an action instituted by Negro citizens of Virginia against the Department of Conservation and Development, Division of Parks, of the Commonwealth of Virginia and the individual park commissioners to enjoin threatened racial discrimination in the operation of Seashore State Park. Decree was entered therein enjoining the defendants, their "agents, lessees and successors in office" from denying to "any person of the Negro race, by reason of his race and color, the right to use and enjoy the facilities" of the park. The decree further provided "that if said Park or any part thereof is leased, the lease must not, directly or indirectly operate so as to discriminate against the members of any race". The defendants have appealed complaining especially of the provision last quoted.

We think that the decree appealed from is correct for reasons adequately stated in the opinion of the District Judge and that little need be added thereto. See 133 F. Supp. 53. It is perfectly clear under recent decisions that citizens have the right to the use of the public parks of the state without discrimination on the ground of race. Dawson et al. v. Mayor and City Council of Baltimore 4 Cir. 220 F. 2d 386, aff. 350 U. S. 877; Holmes v. Atlanta 350 U. S. 879. And we think it equally clear that this right may not be abridged by the leasing of the parks with ownership retained in the state. See Lawrence v. Hancock 76 F. Supp. 1004, 1009; Muir v. Louisville Park Theatrical Ass'n 347 U. S. 971. And it is no ground for abridging the right that the parks cannot be operated profitably on a nonsegregated basis. Since the park here could not be operated profitably on such basis and leasing was being contemplated for that reason, it was proper to insert in the decree a provision which would protect the rights of plaintiffs in the event of lease. Cf. Regal Knitwear Co. v. N. L. R. B. 324 U. S. 9, 14-16. As said by the District Judge:

> "The short answer to the argument advanced by defendants, that there is insufficient evidence to justify a permanent injunction based upon future threatened irreparable injury, lies in the testimony of the Director (Long) in that he admits that Seashore State Park cannot be operated profitably on an 'unsegregated' basis by the Department of Conservation and Development. While this Court is inclined to agree with this statement, if this be true, it stands to reason that no individual may operate the park at a profit without enforcing segregation. Should the successful lessee elect to admit Negroes only, then the members of the white race have just cause to complain. If it is operated for the benefit of only the members of the white race, the Negroes may complain. Accordingly, the defendants are required to elect to operate on a non-discriminatory basis, or, if leased, to see that the park is operated by the lessee without discrimination."

There is no merit in the contention of appellants that the decree appealed from is too vague and indefinite.

Affirmed.

GOVERNMENTAL FACILITIES
Swimming Pools—Florida

Fred ALSUP et al. v. CITY OF ST. PETERSBURG, a Municipal Corporation, et al.

United States District Court, Southern District, Florida, March 22, 1956, Civ. No. 2860.

SUMMARY: Negroes in St. Petersburg, Florida, brought a class action in federal district court against officials of that city. The plaintiffs alleged that they were being unlawfully excluded from the use of a municipal swimming pool and beach because of their race in violation of the Fourteenth Amendment. The city defended on the ground that the operation of the swimming pool and beach was undertaken in the proprietary capacity of the city and therefore not within the reach of the Fourteenth Amendment. The Court held that the Fourteenth Amendment prohibited racial discrimination by the city in any capacity and issued an injunction restraining the city from refusing to allow Negroes to use the municipal pool or beach. On motion by the city, the court suspended the operation of the final decree and injunction pending an appeal of the case.

WHITEHURST, District Judge.

This cause coming on to be heard upon plaintiffs' Motion for Summary Final Decree on the Pleadings and the court having heard argument of counsel and being fully advised in the premises, does hereby find and decree:

FINDINGS OF FACT

The factual situation is admitted. The Complaint alleges that the defendants operate a swimming pool and bathing beach called Spa Pool and Beach from which negroes are excluded by reason of the fact that they are negroes and in violation of the provisions of the 14th Amendment to the Constitution of the United States. The Answer of the defendants admit that negroes are barred from said swimming pool and bathing beach but deny that the exclusion of negroes from said pool and beach is in violation of the 14th Amendment but assert that in the operation of said swimming pool and bathing beach the City is acting in its proprietary capacity and therefore is not within the restrictions imposed by the 14th Amendment.

CONCLUSION OF LAW

It is admitted that the swimming pool and bathing beach is operated on a fee basis and the defendants having alleged that said pool and bathing beach is operated by the City in its proprietary capacity, this court can concede that to be the fact. Nevertheless, it is the opinion of this court that the capacity in which the municipality operates its swimming pool and beach is immaterial and regardless of the capacity in which the municipality may operate the pool, its operation is subject to the provisions of the 14th Amendment of the Constitution of the United States and therefore the plaintiffs are entitled to the relief sought.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendants be restrained and enjoined from refusing to allow plaintiffs and other negroes similarly situated to make use of the municipal Spa swimming pool and beach on the same basis as white citizens of the municipality.

IT IS FURTHER ORDERED that defendants, their agents, employees and servants be restrained and enjoined from promulgating any rule or regulation for the purpose of segregating the races in the use of said municipal Spa pool and bathing beach.

DONE AND ORDERED at Tampa, Florida, this 22nd day of March, 1956.

ORDER

This cause coming on to be heard upon Motion filed by the defendants to suspend the final decree and the order of injunction contained therein, and it appearing to the Court that no great injury would result in the suspension of the final decree and the injunction pending the appeal in said cause;

NOW, THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the final decree heretofore entered by this court be suspended and that the order of injunction contained therein be suspended and superseded pending the appeal.

DONE AND ORDERED at Tampa, Florida, this 22nd day of February, 1956.

GOVERNMENTAL FACILITIES
Restaurants—Texas

M. W. PLUMMER et al. v. Bob CASE, the duly and legally elected, qualified and acting county judge of Harris County, Texas, et al.

United States District Court, Southern District, Texas, December 29, 1955, Civ. No. 7662.

SUMMARY: Negroes in Harris County, Texas, brought an action in federal district court seeking to restrain county officials and the lessee of a restaurant operated in the county court house from denying service in the restaurant to Negroes. The county officials defended on the ground that the restaurant was leased to a private individual for operation and that the lessee could legally restrict his service to whomever he chose. The Court held that the county, having undertaken to furnish eating facilities, must afford substantially equal facilities for all persons regardless of race or color, under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Court further held that the lessee's operation of the restaurant was colorably governmental action and that the lessee had a similar duty not to exclude Negroes from the restaurant solely on the basis of race or color.

CONNALLY, District Judge.

The instant action is another involving the question of segregation. At issue here is the claimed right of the plaintiffs to patronize a cafeteria maintained in the Courthouse of Harris County, Texas. The plaintiffs are members of the Negro race. They are citizens and taxpayers of the State of Texas and of the United States, and are residents of this District and Division. In their individual right, and on behalf of all other persons of the Negro race similarly situated, plaintiffs complain of the duly elected, qualified and acting County Judge and members of the Commissioners' Court of Harris County, Texas, who collectively compose the governing body of Harris County, Texas, a body corporate and politic, and a political subdivision of the State of Texas. An additional defendant is one W. F. Derrington, lessee and operator of the Courthouse cafeteria and its appurtenances.

Jurisdiction is invoked under §§ 1331 and 1343 of Title 28, U.S.C.A. Plaintiffs contend that the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the Constitution of the United States is denied them, in that they are and have been routinely excluded from the Courthouse cafeteria solely by reason of their race and color. Specifically, plaintiffs allege that they were excluded on August 27, 1953, when they sought to buy and consume food upon the premises.

By way of relief, plaintiffs seek a declaratory judgment to the effect that the custom, practice and policy of excluding Negroes from the facilities of the cafeteria constitute a denial of the equal protection of the laws to plaintiffs and are unlawful; and a permanent injunction restraining the defendants from further pursuing such policy of exclusion of the colored race solely for racial reasons.

[*Lease by County*]

It is the County's position that under the law of this State it may sell or lease County property not immediately needed for governmental purposes, and that by reason of its lease to Derrington, it has no power or right to control the premises or the operation of the cafeteria thereon by the lessee; that in executing the lease, the County acted in a corporate and private capacity, and the leased premises were not burdened with any devotion to public use, while the rentals received therefor were and are expended for governmental purposes for the equal benefit of all citizens; and that the lessee, like any other private restaurateur (and unlike a common-law innkeeper) may serve, or refuse to serve, whomsoever he chooses. The lessee Derrington points out that he, as an individual, owes no obligation of equal protection to the plaintiffs or any other person, and adopts the contentions made by the County.

Plaintiffs did not apply for a preliminary injunction, and the action has remained on the docket until called for hearing in due course on the merits, and on plaintiffs' application for declaratory judgment and permanent injunction.

[*New Lease*]

The facts are not in dispute. In the summer of 1953, a new Courthouse in and for Harris County was substantially completed and was occupied. The edifice was constructed with public funds, the proceeds of tax moneys and of a duly authorized bond issue. The structure houses the Courts, offices of the County officials, and other State and County instrumentalities. In the basement, kitchen and other facilities necessary for the operation of a cafeteria were installed. The County never operated the cafeteria, but leased same to the defendant Derrington from the beginning. It is stipulated that the lease to Derrington was made after advertising for and receiving bids from any and all interested parties, and that the ensuing lease agreement was in all respects a bona fide and arms length transaction, and entered into in compliance with all requirements of law. The term of the lease was from June 10, 1953, to December 31, 1954. Save for certain routine provisions that the lessee would not permit waste, disorder, etc., in which event certain control might be assumed by lessor, the lease vested sole and exclusive control of the premises in the lessee for the purpose of operating a cafeteria. A substantial and reasonable rental was provided for. While no express option to renew was reserved in the lease, there was a tacit understanding that the lessee would make substantial investments in equipment, etc., and that he might renew on expiration of the original lease; and pursuant thereto, the original lease has been renewed by a second instrument identical in all respects except the term thereof, such latter term running from January 1, 1955, to December 31, 1956.

[*Denial of Service*]

The cafeteria is patronized principally by Courthouse employees, jurors, and others having business in the building. It has always been open to the general public as an eating place. On August 27, 1953, the plaintiffs undertook to purchase food in the cafeteria and were not permitted to do so by the lessee and manager, the defendant Derrington. His action in this respect was due solely to the fact that the plaintiffs were members of the colored race. With limited and insignificant exception, Derrington has operated the cafeteria since the inception of his lease for patronage only by members of the white race. He expects to continue to do so unless and until restrained by Court action.

The present civil action was filed in this Court August 28, 1953, so that at the time of executing the renewal lease both lessor and lessee had knowledge of the claims which plaintiffs asserted, and of the pendency of this action seeking to enforce them.

In recent years, many facets of the segregation question have been before the Courts. The equality of the races before the law, and their entitlement to equal enjoyment of State and municipally-operated facilities for education, recreation, etc., are now fully recognized and enforced. It is common knowledge that efforts at segregation under varying circumstances have been stricken down in the public schools[1], in municipally-owned golf courses[2] and swimming pools[3], and public parks[4] and beaches[5].

[*Relief Against County*]

In view of the foregoing authorities, there can be little doubt but that plaintiffs are entitled to relief against Harris County. Having undertaken to furnish eating facilities to its citizens, the County, so far as it is able, must afford comparable and substantially equal treatment to all, without regard to color. The County has not established, nor is there maintained, any comparable eating facility in the Courthouse available to Negroes. The County has renewed its lease with Derrington with full knowledge of all of the foregoing facts and of the pendency of this action. In doing so, it took no steps looking toward provisions for appropriate accommodations for plaintiffs and others of their race. This constituted a denial to these plaintiffs of the equal protection of the laws to which they were and are entitled (Lawrence v. Hancock, supra).

The relief, if any, to which plaintiffs may be entitled against the defendant Derrington presents a more difficult question. While the Courts

1. Sweatt v. Painter, 339 U.S. 629; McLaurin v. Oklahoma, 339 U.S. 637; Brown v. Board of Education, 347 U.S. 483; Bolling v. Sharpe, 347 U.S. 497.
2. Beal v. Holcombe, 193 F.2d 384; Holmes v. City of Atlanta, 223 F.2d 93; Sweeney v. City of Louisville, 102 F. Supp. 525.
3. Kansas City v. Williams, 205 F.2d 47; Lawrence v. Hancock, 76 F. Supp. 1004; Culver v. City of Warren (Ohio), 83 N.E.2d 82.
4. Tate v. Department of Conservation, 133 F. Supp. 53.
5. Dawson v. Mayor, etc., of Baltimore, 220 F.2d 386.

have been quick to strike down colorable and spurious lease agreements, or other devices designed solely to permit unlawful segregation (Lawrence v. Hancock, supra; Tate v. Department of Conservation, supra), by stipulation here, the lease was in all respects bona fide, and the exclusion of plaintiffs on August 27, 1953, was the act of Derrington alone[6].

Conceding for the moment that a restaurateur at common law may arbitrarily select his clientele, in my judgment, that privilege does not extend to the defendant Derrington under present circumstances. It must be borne in mind that the lease to Derrington was one of long duration. In operating the cafeteria upon the Courthouse premises, he does so side by side with all other County offices and instrumentalities. These facilities were installed by the County, and leased to Derrington, to serve as a convenient eating place for those having business with the County. In acquiring the concession under these circumstances, Derrington was charged with notice of these obvious facts. He had actual knowledge of the pendency of this action when he renewed and accepted the present lease. To adopt the language of the Court in Nash v. Air Terminal Services[7], the operation of the cafeteria here is too close, in origin and purpose, to the functions of the County government to allow the concessionaire the right to refuse service without good cause.

[*Judgment*]

Judgment will enter declaring that the defendant Harris County by its acts may not constitutionally deny the plaintiffs and other members of the Negro race similarly situated the right to patronize the Courthouse cafeteria, and an injunction will enter preventing and restraining the defendant Harris County from renewing or extending the present lease, from executing a new lease, or otherwise divesting itself of management and control of the premises without specific assurances that facilities will be made available for the use of colored persons under circumstances and conditions substantially equal to those afforded members of the white race. The judgment likewise will declare that under the circumstances here prevailing, the defendant Derrington, subsequent to the date hereafter mentioned, may not continue to exclude members of the colored race from patronage in the cafeteria solely by reason of their race or color.

By reason of the fact that changes in many of the policies and practices now prevailing in the operation of the cafeteria may be desired by the defendants, the entry of an injunction as to the defendant Derrington will be withheld for a period of ninety days.

The foregoing is adopted as Findings of Fact and Conclusions of Law.

Clerk will notify counsel.

6. The stipulation recites, in part,
"That the plaintiffs named in the above styled and numbered cause presented themselves for service in the cafeteria of the Harris County Court House, Houston, Texas, on the 27th day of August, 1953, while defendant W. F. (Dee) Derrington had said cafeteria under his sole direction, supervision, authority, sanction, instruction and control; and that he, the said defendant, informed plaintiff M. W. Plummer that said cafeteria did not, and would not serve colored people, including plaintiffs and each of them, and thereafter said defendant removed the items of food from the tray of plaintiff M. W. Plummer.
"That said defendant W. F. (Dee) Derrington has the said cafeteria under his sole control, supervision, authority, direction, instruction and sanction on the date of these stipulations."

7. 85 F. Supp. 545, U.S. District Court, Eastern District of Virginia.

TRANSPORTATION
Buses—Alabama

CITY OF MONTGOMERY, Alabama, a municipal corporation v. MONTGOMERY CITY LINES, INC., a corporation.

Circuit Court of Montgomery County, Alabama, In Equity, May 9, 1956, No. 30358.

SUMMARY: Following the announcement of the dismissal of the appeal by the United States Supreme Court in *South Carolina Gas and Electric Co. v. Flemming, supra*, p. 513, the operators of a bus transportation system in Montgomery, Alabama, directed its employees

to cease enforcement of racial segregation, as required by city ordinances and state law, on its buses. The city brought a bill to restrain the bus company from violating the city ordinances and state law requiring segregation. The Court issued the injunction, holding as erroneous and of no authority the decision of the United States Court of Appeals for the Fourth Circuit in *Flemming v. South Carolina Gas and Electric Co.*, 224 F.2d 752, 1 Race Rel. L. Rep. 183 (1955) to the effect that required racial segregation on local buses violates the Fourteenth Amendment. The Court further held that such required segregation was a proper exercise of the police power of the state under the Tenth Amendment. A transcript of the hearing is set out following the opinion and decree of the court.

JONES, P. J.

OPINION AND DECREE
OF THE COURT

This matter is now before the Court on petition of City of Montgomery, Alabama, a municipal corporation, seeking an injunction; and also on demurrer and answer of the Respondent, Montgomery City Lines, Inc., a corporation. Both Complainant and Respondent are present in court by their attorneys.

The bill is verified by the President of the Board of Commissioners of the City of Montgomery, Alabama, and the answer is verified by the Assistant Superintendent of Transportation of Montgomery City Lines, Inc. It is agreed by the parties that both bill and answer may be considered in lieu of affidavits. Upon motion by the City of Montgomery the Court permits the taking of additional testimony orally.

Upon the taking of the testimony and argument by counsel on demurrer and on the facts the Court finds among other facts the following:

Respondent has operated a bus transportation system in the City of Montgomery under nonexclusive franchise for a period of approximately twenty years. During this time it has obeyed the ordinances of the City of Montgomery and applicable statutes of the State in reference to segregation. A few months ago a boycott of the bus system was begun by Negroes in the city. The Respondent continued operation of the buses at a financial loss.

[*Bus Company's Order*]

Recently because of publicity to the effect that the United States Supreme Court had declared certain statutes in South Carolina regarding segregation, unconstitutional, the Respondent issued a bulletin to all its employees as follows:

"BULLETIN #5-56
MONTGOMERY CITY LINES, INC.
April 23, 1956

TO: ALL EMPLOYEES
SUBJECT: SEATING ON BUSES

We have been advised that today Monday, April 23, 1956, the Supreme Court of the United States rendered a decision the effect of which is to hold unconstitutional segregation of races on buses. Under the circumstances the Company has no choice except to discontinue the practice of segregation of passengers on account of race and drivers will no longer assign seats to passengers by reason of their race.

/s/ J. H. BAGLEY
J. H. Bagley,
Transportation Superintendent

JHB:vkw
cc: Mr. K. E. Totten
Mr. B. W. Franklin
Chicago Office."

Subsequent to said time on request of the City of Montgomery to Respondent that it abide by the ordinances of the City and the Statutes of Alabama regarding segregation, the Respondent refused.

A situation of tension and unrest has been created in the City of Montgomery, which is likely to explode into violence at any time, if not restrained.

The legal questions in this case are three in number. The first of these arises out of an averment in the answer of the Respondent that there is presently pending in the United States District Court for the Middle District of Alabama, Northern Division, at Montgomery, an action entitled "Browder et al. vs. Gayle et al., Civil Action No. 1147-N" and that the decision

in that case will be determinative of the matters here involved. No evidence of any type is presented to this Court in reference to said civil action and no allegation is made except the general conclusion by the Respondent. The Attorney for the City of Montgomery contends that the issues are not the same; that the parties are not the same, and that for these and other reasons Comity does not require that this action be abated. However, the Court is of opinion that the facts before this Court in reference to said proceeding are insufficient to justify this Court's going into them at this time, and the consideration of arguments pro and con is unnecessary.

[*Injunction Against Crime*]

Another legal issue is the question of whether a court of equity will consider a case which involves a criminal matter. The Court is of opinion that this matter is disposed of by the case of Corte v. State, 259 Ala. 536, 67 So.2d 782. In that case the Supreme Court of the State of Alabama held that where public rights, property and welfare are jeopardized and an injunction is needed for their protection, the criminality of the acts complained of does not bar remedy by injunction. Said the Court in part:

> "'Where an injunction is necessary for the protection for public rights, property or welfare, the criminality of the acts complained of does not bar the remedy by injunction, and the court will consider the criminality of the act only to determine whether, under the particular circumstances, equitable intervention is necessary."

See also Bryan v. Mayor and Aldermen of City of Birmingham, 154 Ala. 447, 45 So. 922.

The Court is of opinion that under the facts of this case, the holding in the Corte case is applicable.

[*Constitutionality of Segregation Laws*]

The only other legal phase is the question of whether the ordinances of the City of Montgomery and the statutes of the State of Alabama regarding segregation are constitutional.

This phase presents for determination by the Court two questions:

(1) Does the Alabama state law providing for the segregation of the races on common carriers in intra-state commerce, each race having equal accommodations (Code 1940, Title 48, section 301 (31a) 1951 Pocket Parts) offend any provision of the United States Constitution or of the Alabama Constitution; and

(2) Does the ordinance of the City of Montgomery (City Code Montgomery 1952, sections 10 and 11) requiring operators of bus lines within the city to assign seats in the buses so as to separate the white people from the Negroes riding in the same bus, violate the State Constitution or any provision of the Federal Constitution.

So far as the city ordinance attacked here, requiring the separation of the races on buses, is concerned we have the Alabama Supreme Court decision (1899) Bowie v. Birmingham Railway & Electric Company, 125 Ala. 397, 27 So. 1016, holding that a regulation of a street car company requiring white passengers to sit in one part of the car and Negro passengers to sit in another part of the car, is reasonable. The Court holds that the right of the company to adopt and enforce such a rule is founded on its right of private porperty in the means of conveyance and the public interest.

This opinion by Tyson, J., is one of the leading cases in the nation. The Court observed among other things:

> "It is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well known customary repugnances which are likely to breed disturbances by a promiscuous sitting. This is a proper use of the right of private property, because it tends to protect the interests of the carrier as well as the interest of those he carries. If the ground of regulation be reasonable, courts of justice can not interfere with his right of property."

Then the Court considers what the rights of a passenger are and answers the inquiry by stating:

> "The right of the passenger is only that of being carried safely, and with a due regard to his personal comfort and convenience, which are promoted by a sound and well regulated separation of passengers."

The Alabama Supreme Court adopts, word for word, an opinion delivered by Mr. Justice Agnew of the Supreme Court of Pennsylvania in the case of West Chester & Philadelphia Rail-

road Co. v. Miles, 55 Pa. State 209, where the identical question then before our Supreme Court was before the Pennsylvania court. That court held that a regulation of a railroad company requiring the train conductor to seat white passengers in one part of the railroad coach and Negro passengers in another part, was a reasonable regulation.

The court also quotes a decision of the United States Supreme Court, Hall v. Decuir, 95 U.S. 485, sustaining a similar rule made by the owners of a steamboat. The United States Supreme Court then said:

> "What the passenger has a right to require is such accommodation as he has contracted for, or, in the absence of any special contract, such suitable accommodations as the room and means at the disposal of the carrier enable him to supply; and in locating his passengers in apartments at their meals, it is not only the right of the master, but his duty, to exercise such reasonable discretion and control as will promote, as far as practicable, the comfort and convenience of his whole company."

So the Court concludes, from a study of these well-considered cases, and there are many, many other similar holdings by the courts of the land, that if our higher courts sustain the right of a carrier of passengers to make reasonable rules and regulations and for the separation of the races in its vehicles, then for a stronger and more compelling reason an ordinance of the city in which the buses operate entirely in intra-state commerce, must be sustained.

[*Contract of Carriage*]

In the case now before the Court it is not contended that the Negro passengers have any special contract of carriage with the bus company. They know when they pay their fare and enter the bus that the ordinance of the City of Montgomery and the law of the State of Alabama write into the implied contract of the bus company to carry safely, the further condition that white and Negro passengers shall sit in separate parts of the bus. This city ordinance and the Alabama law are a part of the implied contract of carriage. Neither the passenger nor the bus company has authority to annul or reject these laws.

No section of the Alabama Constitution has been cited to the Court which prohibits reasonable regulations separating the races on buses. There is none. On the other hand we have the wise and sound decision of our highest State court sustaining rules and regulations prescribed by the carrier for the transportation in intrastate commerce of white and Negro passengers. This decision has never been overruled. It is the law of this case today and must be followed by the Court. We have also the Alabama law requiring common carriers to provide separate but equal accommodations for the "white and colored races."

It results that the Montgomery city ordinance does not offend the Alabama Constitution.

It is next insisted that the city ordinances and the provisions of the Alabama Code, hereinbefore referred to, offend the Constitution and laws of the United States. There is no straight out decision of the Supreme Court of the United States holding that a State or city may not require the separation of the races on buses where carriage of passengers is solely intrastate.

[*Flemming Case*]

There is a decision of the Fourth Federal Circuit Court of Appeals, the Flemming Case, 224 F.2d 752 (July 14, 1955) drawing the conclusion that some decisions of the Federal Supreme Court, particularly the School Segregation cases, Brown v. Board of Education of Topeka, 347 U.S. 483, 98 L. Ed. 873, indicate that the highest federal court will declare invalid, if and when the question is presented, bus segregation ordinances, even where all the passengers are purely intra-state passengers and are only carried from one point in a city to another part of the same town.

This decision of the Fourth Circuit Court of Appeals in the Flemming Case is not well reasoned, is not sound law and certainly a State court in Alabama is not bound by the unsound reasoning, or rather lack of reasoning, of this court's opinion. Were the opinion sound and well reasoned, it might be of the class called 'persuasive' authority but for the reasons pointed out it is not even *persuasive* on the Court in the instant case and is, of course, without any binding authority whatever. At best it is simply the guess of the Fourth Circuit Court of what the United States Supreme Court will hold.

[*Court's Authority*]

This Court, in deciding the case now before

it, does not sit as a legislative body to make law. That is not the function of the courts. Their function is to declare and construe the law as it is made and written by the law-making departments of our governments. Courts cannot, under the guise of construction make a law. The making of laws is exclusively the function of the legislative department of the government.

The question now before this Alabama court, a court of one of the sovereign States of the Union, can be answered by a reference to the Federal Constitution, to a part of the Bill of Rights in the United States Constitution, one neglected of recent years and practically forgotten by the federal courts. Yet it is a part of the United States Constitution which, if it had not been put in the federal Bill of Rights would have prevented the adoption of the Federal Constitution. It is a part of the Constitution which was regarded as absolutely essential in the formative days of our country. The Founding Fathers were agreed that there should be an amendment to the Constitution making plain and clear that unless the States delegated to the federal government a power or prohibited to themselves the exercise of a power, then the States *reserved* that power to themselves in their people.

The section of the Bill of Rights which the judge of this court has taken an oath to support and maintain, is Amendment X to the Constitution which declares:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This states a great principle of American constitutional law, and states it in such simple words that the meaning can be understood by all. There is neither ambiguity nor doubt in the language of the Tenth Amendment. If the power claimed by the United States, or by its law-making Supreme Court, is not a power delegated to the United States, nor a power the sovereign States of the Union have denied themselves, then that power is expressly reserved to the States or to the people of the States.

[*Police Powers*]

Where in the United States Constitution (may we ask) is there any delegation of power to the United States Government to say that a State cannot make reasonable regulations for the carriage of passengers on public conveyances wholly within the State? Where in the Federal Constitution is there one word, one sentence, or one paragraph, saying that the sovereign States of this Union, the states which created the federal government, and many of whose constitutions antedate the Federal Constitution, are prohibited from making, in the exercise of the police power of the State, reasonable rules for the separation of the races in buses carrying passengers in a city or between two points wholly within the State?

The Federal Constitution neither delegates the power claimed to the United States, nor does it prohibit the power to the States of the Union.

[*Federal v. State Powers*]

We must always remember that the government of the United States is one of limited powers. It cannot exercise any power of government not granted to it by the States. The federal government gets whatever powers it has, and only such, as are ceded to it by the States of the Union. All other rights and powers, necessary to maintain our dual system of government, remain in the States. And in the States these powers rightfully remain. They have never been ceded or given to the national government at Washington.

The Court can nowhere find in the Federal Constitution any grant of the power to say to the sovereign States of the Union: "You cannot regulate within the borders of your own cities and States the carriage of passengers by bus. You cannot require white passengers to occupy seats in one part of the bus and Negro passengers seats in another section of the bus."

The Constitution, torture its wording as you may, nowhere gives the federal government at Washington, nor the Congress of the United States, nor the United States Supreme Court, the power to forbid a State, in the exercise of its police power, to separate passengers using buses from one point to another point wholly within a given State. The power claimed for the federal government by the Fourth Circuit Court of Appeals does not exist and never has existed. It is a power reserved to the States and their people. The courts are without power to enlarge the sphere of federal control and operations, and they have no power to legislate.

The Circuit Court of Montgomery County, Alabama, mindful of its obligation to support

and maintain the United States Constitution, must declare that under the Tenth Amendment to the United States Constitution the power to regulate the intra-state carriage of passengers on buses in Alabama is a power reserved to the State of Alabama. It has never surrendered this power to the United States Government nor given it to the Supreme Court at Washington, and this Court will not be a party to filching the power from the State.

DECREE

The Register will enroll the following decree:

This cause now coming on to be heard before the Court is submitted by the parties for decision upon the verified bill, the demurrer and answer of the Respondent, and

Upon consideration of the same the Court is of the opinion that the demurrer to the bill should be overruled. It is, therefore,

ORDERED, ADJUDGED AND DECREED BY THE COURT that the demurrer of the Respondent to the bill be, and the same is, hereby overruled.

And the Court now considering the matter upon the bill, the answer of the Respondent and the testimony taken orally before the Court, is of opinion and so finds, that the allegations of the bill are sustained, and that the law of the State of Alabama and the ordinances of the City of Montgomery, requiring the employees of bus companies to assign passengers seats so as to separate white people from the Negroes, is a valid exercise of the police power of the State and City, and is not subject to any of the objections urged against them. It is, therefore,

ORDERED, ADJUDGED AND DECREED BY THE COURT that the Respondent company do withdraw the order it has issued to its employees, same being contained in Bulletin #5-56 dated April 23, 1956, with reference to seating of passengers on buses, and the said Respondent, its agents, servants and employees, be, and each is hereby required to comply with and abide by all the provisions of the ordinances of the City of Montgomery and the Statutes of Alabama relating to the seating of white and Negro passengers in separate portions of the conveyances of the Respondent operated within the City of Montgomery and its police jurisdiction.

Let the costs in this cause, to be taxed by the Register, be paid by Respondent, for which, if not presently paid, let execution issue.

TRANSCRIPT OF HEARING

The proceedings at the hearing in the above case (City of Montgomery v. Montgomery City Lines) is reproduced below:

Hearing on May 3, 1956
Before: Honorable Walter B. Jones, Judge
APPEARANCES: Messrs. Walter J. Knabe, and Herman H. Hamilton, Jr., Attorneys, Montgomery, Alabama, for Complainant, City of Montgomery.
Mr. Robert Thrun, Attorney, 20 Pine Street, New York 5, N. Y., for Respondent, Montgomery City Lines.

The Court: I will be glad to obtain a motion or any other statements.

Mr. Knabe: We would like to present Mr. Thrun of the New York Bar, and ask that he be permitted to argue this case.

The Court: We will be glad to have you. What is the status of the pleadings?

Mr. Knabe: The City of Montgomery has filed a bill and they have filed a demurrer.

The Court: General demurrer, no equity in the bill?

Mr. Knabe: That is one of the main ones, no equity in the bill.

Mr. Thrun: I should like to state our demurrer is both a demurrer and sworn answer in lieu of affidavits. The arguments on the demurrer largely follow the arguments that I would like to make on the main case. And I wonder whether it would be possible to proceed with the City proceeding with its argument and then to have me argue, and then to have you rule on the demurrer and answer?

The Court: I was thinking this, if it would be agreeable with both parties, we could submit all the demurrer and answer, of course, the demurrer without waiving and answer without waiving the answer, submit on both, and let

the Court hear the whole thing, then so far as the merits of this particular application, we have some affidavits on that?

Mr. Thrun: No, I thought the sworn answer would serve the purpose of the affidavits.

Mr. Knabe: We would like to use one witness and take it in lieu of–

The Court: In that event the City would have the opening.

Mr. Thrun: As I understand, the Court does not wish to have argument on the demurrers at this time but wishes to take testimony.

MR. CLYDE SELLERS,

being of lawful age, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Knabe:

Q This is Mr. Clyde Sellers?

A Yes, sir.

Q What position do you hold with the City of Montgomery, Mr. Sellers?

A Commissioner of Public Affairs.

Q And in that position do you have charge of the enforcement of the laws and ordinances of the City of Montgomery?

A Yes, sir.

Q In your work have you been closely associated with the enforcement of the laws, particularly in ordinances which relate to segregation on the City Bus Lines?

A Yes, sir.

Q Since the posting of the notice by the City Bus Lines instructing its drivers to no longer observe the segregation laws of the city, what in your opinion will be the result if that situation is allowed to exist, that is, if segregation is broken down at this time without further proceedings on the part of the courts?

A Well, in my opinion that if segregation were broken down now and we would allow the races to mix or desegregate on the busses, that we would have, well, riots; it would be dangerous for people to walk on the streets, actually, and not only just riding the busses.

Q What is your opinion with reference to the condition of the public health, peace and safety if that ruling is allowed to stand on the part of the Bus Company?

A Well, the public safety would be endangered, because of the feeling at present, the tense feeling which, although sleeping at present, would I am afraid erupt if we were to allow the races to mix on the busses.

Q What is your opinion in reference to waiting until there is some outburst? Do you think that is advisable or advantageous for the public welfare?

A No, sir, I always felt that anything you could prevent was much better to wait until after it happened.

Q Now, this particular ordinance and the ordinances under which segregation is provided, provides that there should be certain penalties, criminal penalties, in the event they are violated. Those would consist, of course, in the City of Montgomery of not over a hundred dollars or six months in jail. Do you think that such, to waiting until something happened and then allow the person who was guilty to be punished, do you think that would serve the public welfare?

A No, sir, I do not think it would be to the public interest.

Q Do you think that to allow this would create tension in the City?

A Yes, sir, even more than tension. I think it would go far beyond that.

Q Would you state whether or not you think it would menace the well-being of the people of the City of Montgomery?

A I do, yes, sir.

Q What do you think would be the effect, actually, of the bus transportation system in Montgomery if it is allowed to stand?

A Frankly, with the bus boycott continuing, and if this order is allowed to stand, I feel that the Montgomery City Lines could just park the rest of its busses, because the white people would not ride either.

Q Is it true that the segregation on busses has existed in Montgomery for many, many years prior to this time?

A Yes, sir.

Q And what was the situation as far as peace

and quietude under that regulation and enforcement of that law?

A It has been very good, sir.

Q And what has been the situation since the question of possible desegregation has been raised?

A Well, my office and the Police Department has been flooded with telephone calls and anonymous calls, majority of them, telling us what would happen if we would allow the desegregation of the busses, and did not enforce the law and ordinances.

Q And is it your opinion, is it or is it not your opinion that if desegregation is allowed and the order which the bus company has posted is allowed to stand, is it or is it not your opinion that it would be to the detriment of the public welfare?

A Yes, sir, I think it would be very much in the detriment of public welfare.

CROSS EXAMINATION

By Mr. Thrun:

Q Mr. Sellers, all this evidence as stated by you is a matter of your opinion?

A Yes, sir.

Q It is not based on any specific incident?

A No, sir, we have not had any incidents here.

Mr. Thrun: That is all.

The Witness: Only threatened incidents.

Q Only threatened incidents, by anonymous parties?

A That is correct.

REDIRECT EXAMINATION

By Mr. Knabe:

Q Have there been any instances where failure to observe segregation laws has resulted in litigation in the city or has resulted in prosecution here in the city?

A Yes, sir.

Q And what has been the situation in reference to actual events which have come out of that in reference to disorder?

A There has been quite a bit of disorder, Mr. Knabe.

Q Pardon me?

A There has been quite a bit of disorder.

Q Would you enumerate some of those instances of disorder?

A Well, threats of people to people if they rode the bus; some cases are incidents where people have suffered bodily injury because they have ridden the busses. There has been an attempted bombing and other incidents which have put us to the point where we have had to use, and feel that it is necessary to use our reserve police officers and call out all the help we possibly could to maintain order and peace.

Q Have there been any incidents of discharge of firearms here in the city?

A Yes, sir, quite a few of them.

Q In what respect were those—were those with relation to busses or otherwise?

A Yes, sir, the busses were fired into a number of times. I don't remember the exact number of times, fifteen or sixteen times, and all these instances occurred in the colored sections of the city.

RECROSS EXAMINATION

By Mr. Thrun:

Q Isn't it true that all these instances occurred before the posting of the notice by Montgomery City Lines and at a time when it and its drivers were enforcing the segregation acts and ordinances?

A Yes, sir.

Mr. Knabe: We have no further questions.

The Court: You may be excused.

THIS IS ALL THE EVIDENCE IN THE CASE

Mr. Knabe: Your Honor, as we understand the answer, all other facts in the bill are admitted, and the only things that are in question are conclusions in reference to law.

Mr. Thrun: That is correct, if I understand that you admit the facts in our answer also.

Mr. Knabe: Your Honor, may we check with him just a moment?

The Court: The Court will take a little recess of two minutes; you all put your heads together.

. . . . *At this time a brief recess was taken,*

after which the following proceedings were had . . .

Mr. Knabe: Your Honor, did the Court wish the Plaintiff to make a statement?

The Court: The City may make its own statement.

Mr. Knabe: With reference to the question of facts, the City is willing for the answer, which has been filed, to take the place of affidavits; we have no objection.

The Court: Has the answer been sworn to and verified?

Mr. Knabe: Yes, sir, it is sworn to, as we understand, improperly under the Alabama law. We are willing to waive that technicality. We would merely treat the matters which have been treated in the answer of the Respondent in this case, because we assume that those are the only legal points which will be raised.

They have grouped them very satisfactorily, and easy for us to consider and for the Court to consider. The first thing they suggest is that it is clear that these ordinances and laws of Alabama are no longer the laws in reference to this particular situation. And they have cited, of course, several different cases, particularly the Flemming case as it came out of the Fourth Circuit of the United States and the Brown case. And, our only answer to those is, of course, the doctrine of Plessy V. Ferguson was almost identical with this case, that is the case in which the principle of separate but equal accommodations was laid down.

If the Supreme Court had had a desire to sweep away that in reference to all matters, it had a perfectly good chance in the Brown case. The fact it didn't indicates it seems to us very clearly the Supreme Court had no such intention, certainly at that time, and then they draw the conclusion that because the Supreme Court has failed to reverse the case of Flemming vs. S. C., that that automatically makes it the law of the country.

Of course, it is merely the expression of the Court, of the Circuit Court, and is not the law even insofar as this Circuit is concerned. We will not go into a discussion as to why we think that the Flemming case would not apply, because certainly insofar as this Court is concerned, until they point out some specific thing, the ordinances of the city and state will be presumed certainly in this Court and in most courts to be the law.

The Court: All the ordinances as set out in the last City Code, are they—

Mr. Knabe: They are set out and attached to this particular paper, yes, sir, the pertinent ordinances are attached for the convenience of the Court.

That is the first part of their answer, and then they go to another part, and they say that there is no need for this injunction to be granted. They say that while the Supreme Court has not passed on it, and while the Circuit Court has passed on it, and a great number of people have gotten the apparently mistaken idea that desegregation exists, that while that is true as far as the number feel, that nevertheless the colored people themselves are continuing to segregate and for that reason that there is no need for action in this particular case.

Now, of course, that is a statement of fact so far as it has occurred to the present time, and so far as they know, but, it does not, cannot possibly foretell the future, because it is just like sitting on a keg of dynamite. Any time any person goes in and assumes that desegregation exists and tries to enforce his rights under it as he sees it, there is likely to be a very serious situation and there is no possibility if such situation occurs that we can then turn back the page and say we didn't think this particular thing would happen.

We know positively from the testimony and from general knowledge which the Court, of course, will observe, that there is a serious situation and that if this is allowed to continue, even though at the present time it is voluntarily being done, that in the absence of an order of this Court it may not continue to be voluntarily done.

Those two points, as we see it, constitute the first part of the answer. The second part of the answer is that there is another case pending and that comity requires that this Court give way to that particular case. That case, in the first place, is pending in the Federal Court, and just the barest suggestion of it is made here, but even if all the pleadings in that case were before the Court at this time we feel that there would be no question that this Court not only has jurisdiction but should exercise jurisdiction.

Now the Supreme Court of Alabama had

pointed out in cases we will cite to Your Honor in a written statement, that it is not the existence of the jurisdiction of the state court which is so much of importance as that the jurisdiction exists, and if it does exist, then it is merely a question of the propriety of exercising it, that so much on the question of comity. We feel the case over there is nowise similar to this particular case. In the first place, the issues are different. The issues there involve the constitutionality. There is no attack on the constitutionality here, as we see it.

This is a question of fact, a question of whether an injunction should be granted, whether certain action should be prevented. Over there it is a long-time question of whether the acts and the ordinances are constitutional. So, we think the issues over there are different.

In the second place the parties over there are different. Certain officers of the state are made parties over there, and certain colored people are made parties over there. The colored people are the ones who voluntarily made themselves parties, but the most interesting point with reference to parties is they said both in their answer here that over in that court we are on the same side, and over in this court we are on different sides, so as we see it, the parties cannot possibly, and issues cannot possibly be the same.

Then the other answer we have to that is the question of the immediateness of it. That, over there, we pointed out before is a long range proposition. This is something that needs to be done to fill a gap at the present time.

Now the only other point that they raise is the question of whether or not this Court, whether or not equity would come in when there is a definite provision in reference to criminal prosecution in the event that a violation occurs. And we think that the courts of Alabama have answered that question very clearly. We think the important case, Corte vs. State, 67 So. 2nd 782, 259 Ala. 536 (1953), clearly sets out, and we think there can be no argument in reference to that particular point. In fact, the Court actually poses the question in this way, in the Act that was reported at that time, in the circumstances: it says, that Section 8 of the Act of the Legislature provides that a violation of any of the provisions of this Act constitutes a misdemeanor, so, therefore, the first pertinent question which confronts this Court is whether or not the commission of an alleged criminal act may properly be enjoined; and then it goes on to answer it at great length, citing one case, the Hecht case from the Nebraska courts, and then stating this, citing this, quoting it with approval: "Under the facts disclosed by the record we are of the opinion that a criminal prosecution will not afford the public as complete and adequate relief as an injunction, and that the plaintiff was well within its rights in applying for equity for relief. The public health and safety were proper elements to be considered as to whether equity would take cognizance of the case.

"Further, where an injunction is necessary for the protection of public rights, property or welfare, the criminality of the acts complained of does not involve remedy by injunction."

Then they state their general conclusion in these words, "Where an injunction is necessary for the protection of public rights, property, or welfare, the criminality of the acts complained of does not render by injunction, the court will consider the criminality of the Act only to determine whether under particular circumstances equitable intervention is necessary."

As we have pointed out we think the facts in this case definitely place this particular case within the holding of the Supreme Court. In fact, it seems to us it is exactly the same situation and in this particular case that something is necessary. We feel, as we have said before, that to wait until something happens and assume it won't happen, and just wait until it does happen, that the small penalty of a hundred dollars and six months in the City Jail would certainly not be adequate to compensate somebody whose property had been destroyed and whose life, possibly, had been lost.

The Court: Six months in jail, the minimum punishment?

Mr. Knabe: That is the maximum, not the minimum; that is the maximum under the city ordinances. Our problem is all that would happen, that person would have the minor punishment, whereas somebody else lost not only property but possibly their lives, and the public would be greatly endangered, as well as the public health. Thank you.

ARGUMENT

By Mr. Thrun: May it please the Court, I am not acquainted with your city jails, but it appears to me that Mr. Knabe flatters them.

The Court: It is not a very comfortable place. I have not been down there. I cannot speak from experience.

Mr. Thrun: Since Mr. Knabe, of course, directed himself to our two affirmative pleadings, I won't reiterate the arguments in our brief, but shall just answer briefly those arguments he has made.

First of all on the question of propriety of relief, need for relief, it seems to me that since the incidents which arose before we put up our notice were more serious, that there is equal, if not greater danger, from an injunction compelling us to take down that notice than one allowing us to continue it.

The other matter is that although the federal court case has different parties, both of us are parties, the decree and injunction or relief there will bind both of us, and may either be inconsistent with action by this Court, or if not inconsistent, will render action by this Court unnecessary.

Mr. Knabe mentioned, however, that action here was needed to fill the gap, and I, therefore, direct to the attention of the Court that in its discretion it shall so condition its relief that it will only serve the purpose of filling the gap, if it is inclined to grant the relief asked by the City.

The Court: Now the decision in the Fourth Circuit, what would you call that, persuasive? That is not binding on the state court, is it?

Mr. Thrun: I wouldn't say it was directly binding on the state court, or directly binding in this circuit. But I should like to develop that argument a little in my affirmative argument. Since this is a bill in equity, and there are overtones in part that we have in a sense contemptuously inserted a position in violation of the state law and city ordinances, I would like to spend a few minutes telling this court of the position in which we have been placed.

The action taken by us was taken only after careful consideration and with full realization of the importance of this subject, and the importance of these customs in the state of Alabama. We were timid in our approach, if anything, rather than flamboyant, because we realize that anything we did was subject to being viewed by all peoples and different reactions would follow.

We have enforced the segregation acts and ordinances of the State of Alabama and City of Montgomery for more than twenty years. Even after the protest or boycott was enforced, and it has been enforced now for five months, we continued to obey these laws and ordinances at great cost. In fact, had we not poured in capital to keep the operation going we could not have continued to give service and we could not have continued to employ most of our drivers. Naturally, as the boycott or protest continued, into the 4th and 5th month, we gave serious study to our legal position, and in studying it, I studied it, among others, in a coldly factual way, not in any position of antagonist or protagonist, but as a lawyer giving business advice to a client who had to view coldly what the decisions of the Supreme Court and Federal Courts meant, without any feeling as to whether those decisions were proper or improper.

I, of course, reached the conclusion that we were in a vulnerable position. At that time the Flemming case was pending. The boycott or protest was continuing, and it seemed appropriate to wait for the decision in the Flemming case by the Supreme Court. The appeal was taken there in September 30, 1955, so there was every likelihood of a quick decision.

When the Flemming dismissal came down, it presented the immediate possibility that many negroes would board the bus and insist upon the right to ride in a desegregated manner. Therefore, immediately that the Supreme Court decision came down, we were presented with a problem.

I do not contend that the Flemming dismissal constituted the Supreme Court's passing on the question. In fact, I do not concur in the view in some quarters the decision is confusing. I think the decision is clear, that the action was dismissed on the ground that there was no final order below. I think, however, that overtones of the case the Supreme Court cited, Slaker vs. O'Connor, shows a degree of impatience by the Supreme Court with the fact the appeal was groundless, taken as it was.

The secondary point in the Slaker vs. O'Connor case was the appeal was taken for delay purposes. What was the effect, then, of the Supreme Court decision? Its effect was two-fold, first, to serve clear notice to everyone that this case was coming up again, and that it was leaving in effect the decision of the Fourth Circuit Court of Appeals.

That decision arose in this way, an action for

damages was brought by a negro woman against the bus company because the driver of the bus required her to change her seat in accordance with the segregation law of South Carolina. The bus company interposed the decision of Plessy vs. Ferguson, to which Mr. Knabe referred. The Court of Appeals of the Fourth Circuit, Judge Parker, in per curiam decision, said, "We do not think the separate but equal doctrine of Plessy vs. Ferguson can any longer be regarded as a correct statement of the law."

That decision also referred to a point made in argument that such segregation can be upheld as a proper exercise of the state police power and stated that that was answered in Dawson vs. Mayor and City Council of Baltimore City, which was another Fourth Circuit opinion, but which opinion was affirmed by the Supreme Court and so has the validity of the Supreme Court affirmance, which took place after the Flemming case was decided by the Court of Appeals.

Therefore, viewing those cases coldly as a lawyer advising a client, I advised my client that it could no longer rely on segregation laws as a defense to an action by a colored person against whom the segregation laws were imposed.

One other fact is worthy of mention, and that is that the invalidity resulting from a decision of that nature by the Supreme Court, even if it should be rendered next year, would render that statute and act invalid as of today. There is a floating invalidity. In fact, in the Flemming case, the act complained of was June 22nd, 1954, before the case was decided. So, we were faced with the proposition that if we continued to segregate, even though there were no Supreme Court decision formally overruling Plessy vs. Ferguson, we nevertheless would be subject to damage suits and they could be multiplied almost beyond belief, and certainly beyond the ability of any company to withstand them.

Therefore, our action in posting the notice, saying that we no longer could comply with the statutes and ordinances far from being a hasty action, was merely a prompt action in view of the fact that the problem we were considering, if at all, would arise immediately after that decision, and it is in this respect that the misleading publicity did have an effect, not as a matter of law, but as a matter of creating in the minds of people who read the newspapers' accounts, an immediate problem, and the immediate probability or possibility that the negroes would board busses and insist on non-segregated riding.

The same action was taken elsewhere. It was taken by large companies in the Fourth Circuit, and I think in that case that I must in fairness say that they clearly would find themselves within the ambit of the Fourth Circuit decision, and did not have any possibility of contending that that decision did not apply to them, but it was also taken by companies elsewhere in the Fifth Circuit and in other Circuits. For example, the bus companies in Dallas, Houston, Knoxville, Tennessee, Little Rock, Arkansas, and others, announced the same decision. And indeed, some have announced that decision within the last few days and it is probable that others have done it quietly, who aren't in quite the spotlight we have been here in Montgomery for a long period of time.

Despite this, no incidents have occurred, and I, therefore revert to my argument that incidents are just as likely to occur from reinstitution of enforcement of segregation as they are continuing in the present status until the federal case in this district is decided.

Thank you.

Mr. Knabe: He said all the incidents that have been pointed out occured before this situation arose, before this unfortunate publicity. Our answer to that, we thought is was sufficiently clear not even to mention it in our opening argument, that is if under the former situation there were all of these things that occurred, certainly the position now is even more dangerous. In other words, when we thought everything was running along as it had run for twenty years, if just because there was rumbling of it, now this publicity has come out and they have taken the position they have, it seems to us that certainly there will be much more unfortunate situations which will arise. It seems to me just to summarize their argument, and that is, it seems to me it is this, that on account of publicity, that they are afraid they will be involved in some lawsuits and that they think that the fact that they might be involved in lawsuits is more important than to have the public safety protected.

In other words, they are saying, as we see it, nothing in the world except one thing, that is they would like to avoid some lawsuits and

that they would weigh against that, that is more important than enforcing the public benefit and as we see it, the injunction should be granted and we respectfully request that it be.

Mr. Thrun: I have nothing further to say on the argument, but I understand that under Alabama laws it is important for me to get a ruling on the demurrers before any other ruling to preserve my position, and I appreciate your guidance and help in that respect.

The Court: The Court will take this under consideration, and in the decree rule on the demurrers; if they are good, it will not go further; if the Court holds the demurrers are not good, it will go ahead and proceed, all in one decree.

END OF HEARING

PUBLIC ACCOMMODATIONS
Amusement Parks—Ohio

Ethel FLETCHER v. CONEY ISLAND, Inc.

Supreme Court of Ohio, April 18, 1956, 165 Ohio St. 150

SUMMARY: The appellant, a Negro woman, sued the amusement park corporation because of the denial by the corporation of admission to its amusement park based on race, color or any other reason not applicable alike to all citizens. The appellant relied on an Ohio statute which provided for criminal penalties or civil damages for such a denial of admission to places of public accommodation or amusement. The appellant sought a permanent injunction against the denial of admission, alleging that her remedy at law was inadequate. Suit was brought in an Ohio trial court, which found that the appellant had been denied admission to the amusement park while it was under the control of the corporation and, holding that the remedy at law was inadequate, issued the injunction. 121 N.E.2d 574, 1 Race Rel. L. Rep 360 (1954). On appeal to the Court of Appeals for Hamilton County, Ohio, that court reversed on the ground that the matter was governed by the statute and the rights asserted by the appellant were not properly the subject of equitable relief by way of injunction. Upon a finding by the Court of Appeals that its judgment was in conflict with the judgment of another Court of Appeals in another case, it certified the case to the Ohio Supreme Court. That Court, two judges dissenting, affirmed the Court of Appeals for Hamilton County, holding that the remedy provided by the statute is exclusive and adequate.

[*Syllabus by the Court*]

1. At common law, proprietors of private enterprises such as places of amusement and entertainment can admit or exclude whomsoever they please, and common-law right to exclude continues until changed by legislative enactment.
2. Section 12940, 12941 and 12942, General Code (Sections 2901.35 and 2901.36, Revised Code), which provide, *inter alia*, that the proprietor of a place of amusement who denies to a citizen, except for reasons applicable to all and regardless of color or race, the full enjoyment of the facilities thereof shall be subject to a fine of from $50 to $500 or to imprisonment of from 30 to 90 days or both, or in the alternative to the payment of from $50 to $500 to the person aggrieved by his action, and which make the enforcement of one of such remedies or penalties "a bar to further prosecution for a violation of such sections," demonstrate a plain purpose and intent on the part of the General Assembly to restrict the remedies or penalties available to those expressly provided.
3. The adequacy of the remedies or penalties so prescribed by statute for excluding one from a privately owned and operated place of amusement or entertainment is of legislative and not judicial concern.

[*Statement of Facts by the Court*]

Ethel Fletcher, a Negro woman, the appellant

herein and hereinafter called plaintiff, is a citizen of the United States and of the state of Ohio. Coney Island, Inc., the appellee herein and hereinafter called defendant, is the private owner of an amusement park located and operated near the city of Cincinnati.

On July 2, and again on July 4, 1953, plaintiff applied for but was refused admittance to the park. It does not appear that plaintiff had ever been to the park prior to July 2, 1953, or that she had any desire or intention to return there after July 4.

Relying on Section 12940, General Code (Section 2901.35, Revised Code), plaintiff instituted an action in the Court of Common Pleas of Hamilton County to enjoin defendant from refusing her admittance to its amusement park because of her race or color, or for any other reason not applicable alike to other citizens. She alleges that she has no adequate remedy at law. A demurrer to the petition was overruled, and afterward an amended answer was filed denying the material allegations of the petition and setting up as a defense that on the days in issue the park was being operated under written outing contracts with organizations, which contracts gave those organizations the exclusive right to designate the persons who might or might not be admitted to the park, and that the plaintiff, a member of the National Association for the Advancement of Colored People, which association had previously caused disturbances at the park, was denied admittance because of her membership in that group.

At the trial, upon considerable testimony and the introduction of a number of exhibits, the court found that the discrimination against plaintiff in the refusal to admit her to the amusement park on the days in question was because of her race and color and not for reasons applicable to all; that the defendant was in control of the operation of its park on the days plaintiff was refused admittance and was responsible for the acts of those who excluded her from the park; and that plaintiff has no adequate remedy at law. The court thereupon granted a permanent injunction restraining the defendant from denying plaintiff admittance to the park at any time it is open to the public generally.

Defendant perfected its appeal on questions of law and fact to the Court of Appeals but later reduced the appeal to one on questions of law only. That court determined that the findings of the trial court were not manifestly against the weight of the evidence but that the whole matter is governed by statute, and that the rights asserted by plaintiff are not of equitable cognizance.

The judgment of the trial court was reversed and final judgment entered for the defendant. Upon a finding by the judges of the Court of Appeals that the judgment rendered is in conflict with the judgment of another Court of Appeals in the case of Gillespie v. Lake Shore Golf Club, Inc., 56 Ohio Law Abs., 222, 91 N. E. (2d), 290, they certified the record in the instant case to this court for review and final determination.

ZIMMERMAN, J.

In the case of Madden v. Queens County Jockey Club, Inc., 296 N. Y., 249, 253, 72 N. E. (2d), 697, 698, 1 A. L. R. (2d), 1160, 1162, the generally recognized rule is stated as follows:

> "At common law, a person engaged in a public calling, such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. * * * On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased. * * * *The common-law power of exclusion, noted above, continues until changed by legislative enactment.*" (Emphasis supplied.)

See, also, Bailey v. Washington Theatre Co., 218 Ind., 513, 34 N. E. (2d), 17; annotation, 1 A. L. R. (2d), 1165; and 10 American Jurisprudence, 915, Section 22.

It will thus be observed that the owner or operator of a private amusement park or place of entertainment may arbitrarily and capriciously refuse admittance to whomsoever he pleases, be they Africans, Chinese, East Indians, Germans, Italians, Poles, Russians or any other racial group, in the absence of legislation requiring him to admit them.

No constitutional question is involved in the present case, and counsel for plaintiff frankly concede that, if there were no statute on the subject, plaintiff would have no redress because of her exclusion from defendant's establishment. It becomes at once important then to examine the Ohio statutes governing the situation.

[*Ohio Statutes*]

Section 12940, General Code (Section 2901.35, Revised Code), recites:

> "Whoever, being the proprietor or his employee, keeper or manager of an inn, restaurant, eating house, barber shop, public conveyance by air, land, or water, theater, store or other place for the sale of merchandise, or any other place of public accommodation or amusement, denies to a citizen, except for reasons applicable alike to all citizens and regardless of color or race, the full enjoyment of the accommodations, advantages, facilities or privileges thereof, or, being a person who aids or incites the denial thereof, shall be fined not less than 50 dollars nor more than 500 dollars or imprisoned not less than 30 days nor more than 90 days, or both."

Section 12941, General Code (Section 2901.35, Revised Code), provides:

> "Whoever violates the next preceding section shall also pay not less than 50 dollars nor more than 500 dollars to the person aggrieved thereby to be recovered in any court of competent jurisdiction in the county where such offense was committed."

And Section 12942, General Code (Section 2901.36, Revised Code), recites:

> "Either a judgment in favor of the person aggrieved, or the punishment of the offender upon an indictment under the next two preceding sections, shall be a bar to further prosecution for a violation of such sections."

Statutes like those quoted above as they pertain to privately owned and operated places of amusement or entertainment create new rights, where none existed before, and prescribe remedies or penalties for the violation of those rights.

In the first paragraph of the syllabus in the case of Commissioners v. Bank of Findley, 32 Ohio St., 194, this court held:

> "Where a statute creates a new offense by prohibiting and making unlawful anything which was lawful before, and provides a specific remedy against such new offense (not antecedently unlawful) by a particular sanction and method of proceeding, that method of proceeding, and none other, must be preserved [pursued]."

The proposition is stated a little differently in the second paragraph of the syllabus in the case of City of Zanesville v. Fannan, 53 Ohio St., 605, 42 N. E., 703, 53 Am. St. Rep., 664, as follows:

> "Where a statute which creates a new right, prescribes the remedy for its violation, the remedy is exclusive; but when a new remedy is given by statute for a right of action existing independent of it, without excluding other remedies already known to the law, the statutory remedy is cumulative merely, and the party may pursue either at his option."

[*Penalties Exclusive*]

Plaintiff insists that the penalties provided for a violation of Section 12490, General Code, are inadequate and that resort may be had to equity for the full and complete realization of her rights. The trouble with this argument is that we are dealing strictly with a legislative problem. If plaintiff should have a remedy or remedies in addition to those now afforded, the General Assembly is the agency to say so. Where the General Assembly by statute creates a new right and at the same time prescribes remedies or penalties for its violation, the courts may not intervene and create an additional remedy.

In other words, the General Assembly established the right asserted by plaintiff and then definitely fixed the methods whereby the violator of that right might be punished. That punishment could be inflicted by pursuing one of two courses but not both. An additional remedy by way of injunction was not contemplated by the General Assembly and may not arbitrarily be invoked by the courts. For some unexplained reason the plaintiff has not seen fit to take advantage of either of the two remedies clearly provided by the General Assembly. Instead she asks the courts to indulge in judicial legislation by supplying still a third remedy—manifestly a task for the General Assembly alone.

True, the Court of Common Pleas is a tribunal created by the Constitution, but Section 4, Article IV of that instrument, expressly states that "the jurisdiction of the Courts of Common Pleas, and of the judges thereof, shall be fixed by law." Although the Court of Common Pleas is a court of general jurisdiction, the jurisdiction it may exercise must be found either expressly or by necessary implication in statutory enact-

ments. If the General Assembly has provided a remedy for the enforcement of a specific new right, a court may not on its own initiative apply another remedy it deems appropriate.

As presently applicable to the Court of Common Pleas, the following language of Judge Hitchcock in the case of Wey v. Hillier, 16 Ohio, 105, 107, is pertinent:

> "The courts, it is true, are created by the Constitution. They are by the same Constitution made capable of receiving jurisdiction. But that jurisdiction and its extent, and the manner of exercising it, must be prescribed by the lawmaking power."

Here the General Assembly granted by the enactment of Section 12940, General Code, new rights and provided two remedies or penalties and only two for their violation, either of which may be pursued. If it had intended to make other remedies available it would hardly have required an election between the two remedies specifically prescribed. Certainly, if it had so wished the General Assembly could have stipulated the additional remedy of injunction for the enforcement of Section 12940, General Code (Section 2901.35, Revised Code), as was done for instance in Section 713.13, Revised Code, relating to the violation of zoning ordinances, but it did not do so.

[*Other Cases*]

Plaintiff, in insisting that the courts may invoke and apply the remedy of injunction to ensure her the right of entry into the defendant's amusement park, notwithstanding the General Assembly did not make that remedy available, cites and relies on the cases of Kenyon v. City of Chicopee, 320 Mass., 528, 70 N. E. (2d), 241, 175 A. L. R., 430; Orloff v. Los Angeles Turf Club, Inc., 30 Cal. (2d), 110, 180 P. (2d), 321, 171 A. L. R., 913; Everett v. Harron, 380 Pa., 123, 110 A. (2d), 383.

Suffice it to say that those cases were decided under facts dissimilar to those existing in the present case or under statutory enactments different from those prevailing in Ohio. And we find nothing sufficiently persuasive in the reasoning of the cited cases to cause us to change our position, namely, that the remedies or penalties provided for a violation of those parts of Section 12940, General Code, in issue are exclusive, and that the adequacy of the same is a matter for legislative determination. Compare White v. Pasfield, 212 Ill. App., 73, and Woollcott v. Shubert, 169 App. Div., 194, 154 N. Y. Supp., 643.

In summary, the decision in this case rests squarely on the proposition that at common law those who own and operate private places of amusement and entertainment can admit or exclude whomsoever they please, and that, since such establishments are open to all only through legislative enactments, those enactments govern the situation, and where as a part of those enactments a specific remedy or penalty is prescribed for their violation, such remedy or penalty is exclusive; the adequacy or appropriateness thereof being a matter of legislative concern. This decision is limited to this precise point and should be so read and appraised.

It should be obvious that the present case bears no relation whatsoever to the problem of the segregation of pupils in the public schools, or to the exclusion of a qualified person from an institution of higher learning supported by public funds or of a person from a publicly owned or operated park or recreation facility, because of his race or color.

The judgment of the Court of Appeals is affirmed.

WEYGANDT, C. J., STEWART, BELL and TAFT, JJ., concur.

MATTHIAS and HART, JJ., dissent.

[*Concurring Opinion*]

WEYGANDT, C. J., concurring.

The controlling question here presented is an extremely simple one, and there should be no confusion or misunderstanding about it.

It is important to note that certain questions are *not* here in issue.

1. *No publicly* owned or operated park or recreation facility is involved.

2. There is no claim of discrimination as to remedy. Exactly the same remedies are available to the plaintiff as to any other person.

3. No constitutional question is raised.

As observed in the majority opinion, the entire problem is statutory. It is *agreed* that without the statutes the plaintiff would have *no* remedy whatsoever. It is agreed, too, that the statutes provide two remedies—civil and criminal —which are available to everyone including the plaintiff. However, for some unexplained reason

she does not choose to employ either. Instead, she seeks to resort to a third remedy not even mentioned in the very statutes on which she relies. Like everyone else, she has no cause for complaint when she declines to use the remedies the law provides.

[*Dissent*]

HART, J. dissenting.

I regret that I can not concur in the judgment and opinion of the majority of the court in this case for the reason that, in my opinion, the judgment does not fully protect the civil rights of the plaintiff.

When the cause of action, if any, arose in the instant case, the civil rights of the plaintiff beyond those awarded by the Constitutions were defined by the General Code of Ohio.

Section 12940, General Code (Section 2901.35, Revised Code), provides as follows:

> "Whoever, being the proprietor or his employee, keeper or manager of an inn, restaurant, eating house, barber shop, public conveyance by air, land, or water, theater, store or other place for the sale of merchandise, or any other place of public accommodation or amusement, denies to a citizen, except for reasons applicable alike to all citizens and regardless of color or race, the full enjoyment of the accommodations, advantages, facilities or privileges thereof, or, being a person who aids or incites the denial thereof, shall be fined not less than 50 dollars nor more than 500 dollars or imprisoned not less than 30 days nor more than 90 days, or both."

Section 12941, General Code (Section 2901.35, Revised Code), provides as follows:

> "Whoever violates the next preceding section shall also pay not less than 50 dollars nor more than 500 dollars to the person aggrieved thereby to be recovered in any court of competent jurisdiction in the county where such offense was committed."

And Section 12942, General Code (Section 2901.36, Revised Code), provides as follows:

> "Either a judgment in favor of the person aggrieved, or the punishment of the offender upon an indictment under the next two preceding sections, shall be a bar to further *prosecution* for a violation of such sections."

Section 12940, General Code (Section 2901.35, Revised Code), above quoted, clothes the plaintiff with certain absolute civil rights aside from and independent of the remedies named in the sections of the General Code above quoted. The statute does not make these remedies exclusive, and the question now before the court is whether they are exclusive by implication. Incidentally, the criminal liability by way of fine or imprisonment or both for a violation of these rights provided by Section 12940, General Code, *is not a personal or private remedy* to the person whose rights have been invaded. The remedy is a public one, which may be pursued by any member of the public, and no part of the fine, if one is imposed, goes to the person whose civil rights have been infringed.

The judgment of the Court of Appeals and its affirmance by this court give a person violating the civil rights of one entitled thereto under the statute an option to violate such rights and to continue to violate them, with a mere chance of a prosecution and penalty under a criminal statute or a civil penalty by way of forfeiture fixed by statute, no special damages being required to be shown as to the latter, or both. Such, in my judgment, can not be the law. As some writer has said, such a judgment permits the offender to be "vaccinated by the needle of the law" and thereafter become immune. A person is entitled to the actual and continued enjoyment of his civil rights as vouchsafed by the statute and these can not be permanently thwarted by some other avenue of escape.

I concur in that portion of the opinion of Judge Weber, the trial judge in the instant cause, wherein he said:

> "The statute creates a personal right to every citizen to fully enjoy the facilities of a place of public accommodation upon equal terms with every other citizen. It is inconceivable that the legislative purpose was that some should have the opportunity actually to enjoy the facilities of such a place but that others, equally without personal fault, should be compelled to accept from a wrongdoer money as a substitute for such opportunity.
>
> "* * *
>
> "* * * To sustain such an argument would confirm an absurdity and impugn the integrity of the Legislature which enacted the statute. The injury to the plaintiff by the

wrongful acts of the defendant is irreparable and the statutory remedy is inadequate."

[*Personal vs. Property Rights*]

It is claimed also by the defendant that injunction will not lie to protect personal rights as against property rights. I am unable to concur in that proposition as a universal rule. Many times the courts will exercise equity jurisdiction to protect personal rights from infringement, as in cases of boycott, threatened criminal acts, conspiracies and illegal prosecutions. For instance, equity will enjoin the publication and circulation of posters, handbills and circulars printed and circulated in pursuance of a combination to boycott a newspaper. Casey v. Cincinnati Typographical Union, 45 F., 135, 12 L. R. A., 193. This court has held that where the averments of a petition would, if proved, entitle the plaintiff to an injunction, a writ will not be refused merely because the acts sought to be enjoined are punishable under the criminal statutes of this state. Renner Brewing Co. v. Rolland, 96 Ohio St., 432, 118 N. E., 118. The Court of Appeals of the Eighth Appellate District has held that, notwithstanding the fact that the illegal practice of law by a corporation is punishable as a crime, criminal prosecution does not constitute an adequate remedy barring equitable relief against the corporation, because equity has the facility to prevent further and repeated offenses. Dworken v. Apartment House Owners Assn., 38 Ohio App., 265, 176 N. E., 577. And the Court of Appeals of the Eighth Appellate District has recognized and applied this remedy of mandatory injunction as a proper remedy under the statute in question. See Gillespie v. Lake Shore Golf Club, 56 Ohio Law Abs., 222, 91 N. E. (2d), 290. And the equitable jurisdiction of a court is often exercised where there is a threat of repeated offenses. In this connection, the record shows that there are admissions on the part of the defendant that the plaintiff will be denied her claimed civil right to enter the park in question, regardless of how many times she may apply. This fact alone warrants the exercise of the equitable remedy of injunction.

Again I concur in the opinion of Judge Weber, where he said:

> "The agents of the defendant testified emphatically that the plaintiff would be denied admission to the park whenever she applied. It is evident that neither a recovery at law of the damages permitted by the statute, regardless of how many times the plaintiff recovers, nor convictions and punishments of the defendant, regardless of how often obtained and imposed, will restore to the plaintiff in this case the thing which the Legislature clearly intended to give her and of which the wrongful acts of the defendant have deprived her and will continue to deprive her, namely, the right to enter the park and the opportunity to fully enjoy its facilities."

A leading recent case on this subject is that of Kenyon v. Chicopee, 320 Mass., 528, 70 N. E. (2d), 241, 175 A. L. R., 430, which holds that equity will protect personal rights by injunction upon the same conditions upon which it will protect property rights.

An annotation on this subject is found in 171 A. L. R., 920, 921, as follows:

> "While there is some authority to the contrary, in most of the cases in which the question has arisen, the view has been taken that a person aggrieved by the violation of a civil rights statute is entitled to pursue a remedy which will effectively reimburse him for, or relieve him from the effects of, the violation, or protect against further violation, notwithstanding the statute did not expressly give him such right or remedy." Citing cases from Arkansas, California, Illinois, Michigan, New Jersey, New York, Oklahoma and Washington.
>
> Continuing, this annotation says:
>
> "In a few cases, however, it has been held in substance that the remedies enumerated in civil rights statutes were exclusive, no other remedy being available." Citing cases from Georgia, Illinois, Indiana and New York.

A leading recent case on this subject is that of Orloff v. Los Angeles Turf Club, Inc. (1947), 30 Cal. (2d), 110, 180 P. (2d), 321, 171 A.L.R., 913. In that case after the plaintiff had been twice ejected from a racing park and ordered not to return he brought an injunction suit against the defendant to restrain it from interfering with his entering the park as other persons were permitted to do, basing his right to relief on a civil rights statute of California. Defendant's demurrer was sustained with leave to plaintiff to amend his complaint to claim only damages allowable under the statute. Upon

plaintiff's refusal to amend, his action was dismissed and he appealed. The Supreme Court of California, on appeal, by unanimous decision reversed the judgment of the trial court.

The A. L. R. headnotes to that case are as follows:

"1. The provisions of a statute imposing an obligation on proprietors of places of amusement to admit adult persons who tender proper admission tickets or the price thereof, that anyone refused admission in violation of the statute may recover $100 penalty as well as compensatory damages, do not establish conditions precedent or constitute any form of unusual procedure required to obtain relief and, in view of the requirement that the statute is to be liberally construed, do not exclude availability of preventative injunctive relief against one violating the statute where the statutory remedy is inadequate.

"2. The positive declaration of personal rights in a statute making it unlawful for the proprietor of a place of amusement to refuse admission to any person over age of 21 who presents the proper ticket of admission or tenders the price of admission, and the inadequacy of the remedy provided in favor of one refused admission by way of recovery of the actual damages suffered, and $100 penalty in addition thereto, furnished sufficient reason for the granting of injunctive relief restraining the proprietor of a racecourse from refusing the adult plaintiff admission to, and from ejecting him from the defendant's race-course in violation of the statute.

"• • •

"4. A factor of importance in interpreting a statute prohibiting exclusion of persons over 21 who tender admission price from places of amusement and providing for recovery of actual damages and $100 penalty, and in applying the rule that the statutory remedy provided for a new right is exclusive, is the adequacy of the remedy provided by statute.

"5. Although primarily concerned with protection of property rights in cases where the law fails to provide adequate remedy, jurisdiction of equity, in proper cases, extends to protection of purely personal rights."

In the course of the opinion in that case, the court said:

"A recovery of compensatory damages and $100 is plainly inadequate relief in a case of this character. (See, discussion, 29 Harv. L. Rev., 93; 29 Harv. L. Rev., 640; 39 Ill. L. Rev., 144; 30 Cal. L. Rev., 563, 567.) Compensable damages would be extremely difficult if not impossible to measure and prove. The sum of $100 is a relatively insignificant recovery when we consider that a positive and unequivocal right has been established and violated. It has been held (although dealing with exclusions from public places where there are [*sic*] discrimination on the basis of race or color) that preventive—specific relief is available where a public agency operates the public place. (Stone v. Board of Directors of Pasadena, 47 Cal. App. [2d], 749 [118 P. (2d), 866], in which mandamus was allowed.) Constitutional basis may exist for preventing such discrimination but that is not a factor of sufficient force to deny similar relief where such discrimination does not exist. The right of admission to the places designated is clearly and positively stated (Civ. Code, Section 53) and the inadequacy of the remedy provided in Section 54 is manifest in both cases. If the objects of the Civil Code are to be effectuated, and justice promoted as required by Section 4 thereof, certainly specific relief should be available where the object is to prevent the exclusion of persons from certain places and there are no valid reasons why such relief should be denied.

"• • •

"• • • And there are many instances in which equity has protected purely personal rights (see above references) though in some the courts have reached that result by finding fictional property rights—declaring things property rights which were in truth not of that character (see references, *supra*). On principle it is difficult to find any sound reason for the enunciation of a broad principle that equity will not protect personal rights. There may be situations involving personal rights in which equity will not act. Such situations may arise where the legal remedy is adequate or they may involve a prior restraint on freedom of speech or press (see Dailey v. Superior

Court, 112 Cal., 94 [44 P., 458, 53 Am. St. Rep., 160, 32 L. R. A., 273], Magill Bros. v. Building Service etc., Union, 20 Cal. [2d], 506 [127 P. (2d), 542]) or where there is no established legal right to be protected or some other recognized ground for refusing an equitable remedy is present. The issue should not in logic or justice turn upon the sole proposition that a personal rather than a property right is involved. To so reason, is to place property rights in a more favorable position than personal rights, a doctrine wholly at odds with the fundamental principles of democracy. These concepts of the sanctity of personal rights are specifically protected by the Constitutions, both state and federal, and the courts have properly given them a place of high dignity, and worthy of especial protection." See, also, Everett v. Harron (1955), 380 Pa., 123, 110 A. (2d), 383; People, ex rel. Bennett, Atty. Genl., v. Laman, 277 N. Y., 368, 376, 14 N. E. (2d), 439, 442.

In my opinion, the judgment of the Court of Appeals should be reversed and that of the Common Pleas Court affirmed.

MATTHIAS, J., concurs in the foregoing dissenting opinion.

PUBLIC ACCOMMODATIONS
Bars—Washington

Karl HOLIFIELD v. Thomas A. PAPUTCHIS et al.

Superior Court, State of Washington, County of King, September 23, 1955, No. 471949.

SUMMARY: The plaintiff, a Negro, sued the defendant operators of a tavern in Seattle, Washington, to recover because of humiliation, embarrassment, anguish and anxiety suffered when he was refused service in the tavern because of his race. Recovery in the amount of $200 was allowed.

AGNEW, J.

This matter came on to be heard the 14th day of September, 1955, before the Honorable H. C. Agnew, sitting without a Jury, trial by Jury having been duly and regularly waived by the respective parties through their counsels. Plaintiff appeared in person and by Philip L. Burton, his attorney. The defendants appeared in person and by Tyre H. Hollander, their attorney. Evidence was submitted by both parties, and argument thereon was made by counsel for the respective parties. Whereupon the cause was submitted to the Court for its decision, and the Court having duly considered the same, and being well advised in the premises, now makes and enters the following:

FINDINGS OF FACTS

I

Thomas A. Paputchis and Jane Doe Paputchis, his wife, and Gust Loumis and Jane Doe Loumis, his wife, were at all times mentioned in the Complaint doing business at the Hideout Tavern, and at all times material to the action were residents of Seattle, King County, Washington, constituting marital communities therein.

II

That the defendants were engaged in a public accommodation by dispensing, among other products, the beverage commonly known as "beer" to the public, on the premises, for which compensation was asked and received.

III

That on the 1st day of July, 1954 at about 10:30 o'clock P.M. plaintiff entered the said tavern, proceeded to one of the booths therein located and seated himself. That at said time and place plaintiff was accompanied by a friend, a member of the Caucasian race. The plaintiff and his friend requested that they be served beer. That a waitress, employed by the defendents, refused to serve plaintiff on the ground that he was a member of the Colored race.

IV

That after said refusal, plaintiff and his friend seated themselves at the bar and requested serv-

ice. That the bartender then on duty, Demos Zeguris, an employee of the defendants, also refused service to plaintiff for the reason that he was a member of the Colored race, saying to plaintiff that his refusal was in compliance with the direction of his employer and the result of a fight between colored and white patrons that had occurred in the tavern sometime previously.

V

That the said tavern had previously served Negroes without discrimination on account of their race; that during the period intervening between the fight mentioned above and the 1st day of July, 1954 and a short time after the date last mentioned, the defendants limited their service to Negroes to those whom they knew because of their patronage of long standing, but refused service to Negroes whom they did not know. The defendants did not know plaintiff and refused service to him solely on account of his race and color, but such refusal was due to their desire to avoid the possibility of further difficulty with their patrons.

VI

That plaintiff did not enter said tavern for the purpose of being refused in order to institute a suit for damages, but, on the other hand, would not have entered the tavern if he had any reason to believe that he would have been refused service because of his race. That by reason of the defendants refusal to serve plaintiff, he suffered humiliation, embarrassment, anguish and anxiety to his damage in the sum of $200.00.

From the foregoing FINDINGS OF FACT, the Court now makes and enters the following:

CONCLUSIONS OF LAW

I

That plaintiff is entitled to judgment against the defendants, individually, and the marital community composed of them in the sum of $200.00, and for his cost and disbursements herein taxed in the sum of $28.70.

Let Judgment be entered accordingly.

PUBLIC ACCOMMODATIONS
Bowling Alleys—District of Columbia

CENTRAL AMUSEMENT COMPANY, INC., a Corporation v. DISTRICT OF COLUMBIA

Municipal Court of Appeals, District of Columbia, April 3, 1956, 121 A.2d 865.

SUMMARY: The appellant corporation was convicted in the Municipal Court of the District of Columbia of having denied Negroes admission to its public bowling alleys in violation of an 1869 Act of the City of Washington (set out in the Court's opinion). On appeal the Municipal Court of Appeals upheld the conviction, holding the regulation valid and applicable to the corporation.

Before CAYTON, Chief Judge, and HOOD and QUINN, Associate Judges.

HOOD, Associate Judge.

Appellant, who conducts a public bowling alley business, was convicted of denying admission for the use of the alleys to certain persons of the Negro race. The prosecution was brought under an Act of the Corporation of the City of Washington, approved June 10, 1869, as amended by an Act of said City approved March 7, 1870, which provided:

> "Be it enacted by the Board of Aldermen and Board of Common Council of the City of Washington, That from and after the passage of this act it shall not be lawful for any person or persons who shall have obtained a license from this Corporation for the purpose of giving a lecture, concert, exhibition, circus performance, theatrical entertainment, or for conducting a place of public amusement of any kind, to make any distinction on account of race or color, as regards the admission of persons to any part of the hall or audience-room where such lecture, concert, exhibition, or other entertainment may be given: Provided, That any person applying shall pay the regular price charged for admission to such part of the house as he or she may wish to occupy, and shall conduct himself or herself in an orderly and peaceable manner, while on the premises; and any person or persons offending herein shall forfeit and pay to this

Corporation for each offense a fine of not less than ten nor more than twenty dollars, to be collected and applied as are other fines." (The amendment of 1870 provided that the penalty be not less than fifty dollars.)

Appellant does not question the authority of the Corporation to enact the regulation,[1] or the validity thereof when enacted, or that it remains in force and effect. However appellant urges three reasons why its conviction should not stand.

First, it is contended that the regulation by its express words applies only to "any person or persons," and that appellant is a corporation and not a person. Statutory use of the word person to include corporations is so general that to hold corporations are not included requires clear proof of legislative intent to exclude them.[2] In view of the nature of the regulations it seems clear that it was intended to and does apply to corporations as well as natural persons.

The second contention is that appellant does not have a license for a place of amusement. The argument is that appellant has a license to conduct a bowling alley and that bowling is a recreation and not an amusement. Again bearing in mind the purpose of the regulation, we think "a place of public amusement of any kind" is broad enough to include bowling alleys.[3]

The third contention is that the regulation is discriminatory. The argument is that the body enacting the regulation had legislative authority only over the old City of Washington which now constitutes but a part of the District of Columbia; that although the laws and regulations of the City of Washington were extended to cover that territory formerly composing the City of Georgetown,[4] such laws and regulations were never extended to the territory formerly composing the County of Washington; and that as a result the regulation is discriminatory in that it applies to appellant and others conducting places of amusement in a part of the District of Columbia, but does not apply to those conducting like businesses in another part of the District.

The Fourteenth Amendment, with its guaranty of "equal protection of the laws," does not apply to the District of Columbia,[6] but the Fifth Amendment as applied to the District implies, at least to some extent, equal protection of the law,[7] and discrimination may be so unjustifiable as to violate due process.[8]

It must be noted that appellant makes no claim that the regulation, if applied to it, will cause it any loss of business or will operate to the advantage of its competitors to whom the regulation is inapplicable. Appellant's complaint is not with the regulation itself but with its failure to operate in all parts of the District of Columbia. "Territorial uniformity is not a constitutional requisite."[9] Here the regulation operates uniformly on all those engaged in the same business within a certain portion of the District. When Congress abolished the City of Georgetown and extended the general laws, ordinances and regulations of the City of Washington to that part of the District formerly known as the City of Georgetown, it did not see fit to extend them to that part of the District formerly known as the County of Washington, and no legislative body has since then seen fit to extend them. While it is common knowledge that the portion of the District formerly known as the county no longer differs greatly from those portions formerly included in the cities of Washington and Georgetown, we are unable to say that the regulation under consideration because restricted to a part of the District is so unjustifiable as to be a violation of due process.

Affirmed.

1. While officially referred to as an Act we use the term regulation, as it appears to be a regulatory measure in the nature of a police regulation. See District of Columbia v. John R. Thompson Co., 346 U. S. 100.
2. 13 Am Jur., Corporations, § 11; 18 C. J. S., Corporations, § 8; Fletcher. Cyclopedia Corporations, Permanent Ed., § 7.
3. Amos v. Prom, Inc., D. C. N. D. Iowa, 117 F. Supp. 615.
4. Code 1951, 1 107.
5. At argument, but not in its brief, appellee stated that it does not concede that the regulation is not applicable to the entire District. The case, however, has been presented and argued on the basis that the regulation is restricted to only a portion of the District of Columbia. It may be noted that the *amicus curiae*, who urges affirmance, filed as the major portion of its brief an article in Volume 42, No. 2, of the Georgetown Law Journal, entitled "Post Civil War Ordinances," wherein it is stated, at pages 202-203: "It therefore appears that the 1869 and 1870 ordinances are at present applicable only to those portions of the District of Columbia as are embraced within the areas of the cities of Washington and Georgetown and do not apply to the area of the District lying outside those cities."
6. Neild v. District of Columbia, 71 App. D. C. 306, 110 F. 2d 246.
7. Hamilton National Bank v. District of Columbia, 85 U. S. App. D. C. 109, 176 F. 2d 624.
8. Bolling v. Sharpe, 347 U. S. 497.
9. Salsburg v. State of Maryland, 346 U. S. 545.

EMPLOYMENT
Labor Unions—Federal Statutes

J. D. CONLEY et al. v. Pat J. GIBSON et al.

United States District Court, Southern District, Texas, March 16, 1955, 138 F.Supp. 60.

SUMMARY: Negro employees of railway companies in Houston, Texas, who were members of a union local composed solely of Negroes brought an action in federal district court under the National Railway Labor Act against an "all white" local and its officials, the parent Brotherhood and the railway companies. The employees sought a declaratory judgment and injunctive relief against required membership in a segregated local and alleged discrimination based on race or color in the negotiation and administration of the collective bargaining agreements. The Court dismissed the action for lack of jurisdiction, there being no allegation that the collective bargaining agent was improperly designated or that the agreements negotiated were illegal. (On appeal the United States Court of Appeals, Fifth Circuit, affirmed in a Per Curiam order without an opinion [citing *Slocum v. Delaware, L. and W. R. Co.*, 339 U.S. 239; and *Hettenbaugh v. Airline Pilots Ass'n.*, 189 F.2d 319; which hold that primary jurisdiction in the cases of this nature rests with the administrative agency created to regulate and enforce the statute] 229 F.2d 436 (1956)).

KENNERLY, District Judge.

Plaintiffs J. D. Conley, Stanley Moore, Sr., George L. Carter and B. A. Watson allege in their complaint that they bring this suit under the National Railway Labor Act, Title 45 U.S.C.A. § 151.

They say they are citizens of the United States and of the State of Texas, and that they are Negro employees of the Texas & New Orleans Railroad Company and/or the Southern Pacific Transport Company, corporations doing business in Houston, Harris County, Texas. That they are members of a national labor union or organizations known as the Brotherhood of Railroad & Steamship Clerks, Freight Handlers, Express and Station Employees (for brevity called "Brotherhood"). That the Brotherhood has in Houston, Texas, a local union or subsidiary composed of white men and known as Local 28, and a similar local union or subsidiary composed of Negro men known as Local 6051.

Plaintiffs sue Pat J. Gibson as General Chairman of Locals 6051 and 28, and Raymond Dickerson, Division Chairman thereof. They also sue Local 28. Whether the Brotherhood is sued is not entirely clear, but I am assuming that it is a party defendant herein.

[*Motion to Dismiss*]

Defendants have moved to dismiss alleging lack of jurisdiction, defect of parties defendant, that plaintiffs do not in their complaint present a justiciable issue and that such complaint fails to state a claim upon which relief can be granted. This is a hearing under Local Rule 25 of such motion.

1. Plaintiffs allege that Local No. 28 is the bargaining agent of the members of the Brotherhood and has been so designated in pursuance of such Act. That Local 28 has negotiated with such Railroad Company, et al., a working agreement to which plaintiffs refer in their complaint.[1]

Reference is made to plaintiffs' complaint as a whole. While plaintiffs' allegations are not at all clear, the nature of plaintiffs' case and the relief sought appears to be stated in paragraph three of plaintiffs' complaint (their prayer) in which they pray that the Court enter a final decree

> "(a) Declaring that the segregation of Negro employees of the craft represented by the Brotherhood into a separate local is illegal under the National Labor Relations Act, and is contrary to the Union Shop Agreement of March 1, 1953, and permanently and perpetually enjoin the Brotherhood, its agents, officers, representatives or any of them from requiring plaintiffs to maintain membership in the Union by joining Local 6051, the segregated local—
>
> "(b) That the defendants, and each of them, their servants, agents, members and officers are permanently and perpetually

1. A copy of such agreement does not appear to be among the papers in the case.

restrained and enjoined from refusing to bargain for plaintiffs and those whom they represent on a basis equal to that afforded to white employees, clerks, who are also represented by the Brotherhood of Railway and Steamship Clerks—

"(c) That the defendants, and each of them, their servants, agents, members and officers, are permanently and perpetually restrained from refusing to protect plaintiffs and those whom they represent from discriminatory action because of race or color from whatever quarter emanating."

In paragraph four of their prayer they also pray—

"That this Court issue a permanent injunction forever restraining the defendants, and each of them, their agents, servants, officers and members from permitting, or engaging in any discrimination toward plaintiffs and those whom they represent, from allowing plaintiffs jobs to be abolished summarily, and from allowing the discharge of plaintiffs and those whom they represent, the termination of their seniority on account of race or color when employees of the white race, clerks, are not so affected; and that the defendants be restrained from being or purporting to act as exclusive collective bargaining agent with the T. & N. O. Railroad Company concerning grievances, labor disputes, wages, rates of pay, and hours of employment so long as any acts of discrimination continue, and unless and until the defendant Labor Union, its agents, servants, officers and members give these plaintiffs and all of the other Negro employees whom they represent, equality of representation on any phase of labor negotiations."

In paragraph five of their prayer they also pray—

"Plaintiffs further pray that this Court award them judgment for damages in the amount of Seventy-five Thousand Dollars ($75,000.00)."

[*Jurisdiction*]

Citing Moore v. Illinois Cent. R. Co., 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089; Order of Railway Conductors of America v. Pitney, 326 U.S. 561, 66 S.Ct. 322, 90 L.Ed. 318; Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795; Order of Railway Conductors of America v. Southern Ry. Co., 339 U.S. 255, 70 S.Ct. 585, 94 L.Ed. 811; Hettenbaugh v. Airline Pilots Ass'n Intern., 5 Cir., 189 F.2d 319; Hayes v. Union Pacific Co., 9 Cir., 184 F.2d 337, certiorari denied 340 U.S. 942, 71 S.Ct. 506, 95 L.Ed. 680; Id., D.C. 88 F. Supp. 108; Kendall v. Pennsylvania R. Co., D.C.Ohio, 94 F.Supp. 875; Van Zandt v. Railway Exp. Agency, D.C. N.Y., 99 F. Supp. 520; Butler v. Thompson, 8 Cir., 192 F.2d 831, defendants say in support of their Motion to Dismiss and their claim that this Court is without jurisdiction. That since plaintiffs raise no question of the lawfulness of the selection of Local 28 as a bargaining agent, nor of the validity of such bargaining agreement, jurisdiction is not here. That the Federal Courts are not charged with the duty of policing parties in the performance of collective bargaining agreements under such Act. They press the point that this case should be dismissed for lack of jurisdiction. I think and conclude that defendants' position is well taken and their Motion to Dismiss should be granted.

The case of Moore v. Illinois Cent. R. Co., supra, standing alone may throw some doubt upon this conclusion, but that case does not stand alone. It has been modified and limited by the many cases cited. The present ruling is well stated by the Court of Appeals for this circuit in Hettenbaugh v. Airline Pilots Ass'n, supra, where it is said (189 F.2d 321):

"The Congress did not, by the Railway Labor Act, grant jurisdiction to the federal courts to afford relief for breaches of performance of collective bargaining agreements. Appropriate quasi-judicial tribunals have been established for that purpose. Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795. It is only when collective bargaining agreements are unlawfully entered into, or when the agreements themselves are unlawful in terms or effect, that federal courts may act. The question of federal jurisdiction being decisive, it is not necessary to consider the other contentions made by the parties. The dismissal of the cause for want of jurisdiction was correct."

Plaintiffs apparently stand upon Steele v. Louisville & N. R. Co., 323 U.S. 192, 193, 65 S.Ct. 226, 89 L.Ed. 173, and Tunstall v. Brotherhood, 323 U.S. 210, 211, 65 S.Ct. 235, 89 L.Ed.

187, but those cases are fully considered and differentiated by the Court of Appeals of the Ninth Circuit in Hayes v. Union Pacific R. Co., cited above.

Because of my conclusion that this Court is without jurisdiction, it is not necessary to discuss the other question presented.

Let an order be drawn and presented dismissing the case.

EMPLOYMENT
Labor Unions—Federal Statutes

CENTRAL OF GEORGIA RAILWAY COMPANY et al. v. Odell JONES et al.
Odell JONES et al. v. CENTRAL OF GEORGIA RAILWAY COMPANY et al.

United States Court of Appeals, Fifth Circuit, January 31, 1956, 229 F.2d 648.

SUMMARY: Negro employees of the railway company who were members of the Brotherhood of Railroad Trainmen brought a class action in federal district court against the railway company and the union. The action was based on a contract between the company and the union which the employees alleged unlawfully discriminated against them on account of race. Employees sought injunctive relief against the enforcement of the contract provisions and asked for damages. The district court granted an injunction restraining the company and union from enforcing the discriminatory provisions of the contract and adjudging damages for a one-year period, holding that the Alabama one-year statute of limitations precluded the granting of damages for more than one year prior to the commencement of the suit. The railway company and the union appealed and the employees cross-appealed the disallowance of damages for more than one year. The United States Court of Appeals, Fifth Circuit, affirmed, one judge dissenting in part.

Before RIVES, JONES and BROWN, Circuit Judges.

PER CURIAM:

In an agreement made in 1952 between the appellants, Central of Georgia Railway Company and Brotherhood of Railroad Trainmen, a provision having its origin in a contract made more than thirty years before was included which prohibited negroes from being used in certain positions in the train service of the Railway. The appellees, Negro employees of the Railway and members of the Brotherhood, brought a class suit in which they alleged discrimination on account of race, and sought an injunction against the enforcement of the contract provision and the practices it authorized. Damages were also asked. The District Court granted the relief sought but, invoking the Alabama Statute of Limitations, it allowed damages only for the period of one year prior to the commencement of suit. The Railway and the Brotherhood appealed. The employees took a cross-appeal asserting that the one-year limitation period was inapplicable. The District Court was right. The law on the substantive question is well established by Steele v. Louisville & N. R. Co., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173; Tunstall v. Brotherhood, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187; Graham v. Brotherhood, 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22; Brotherhood of R. R. Trainmen v. Howard, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283; Rolax v. Atlantic Coast Line R. Co., 4 Cir., 186 F.2d 473; Brotherhood of Locomotive Firemen and Enginemen v. Mitchell, 5 Cir., 190 F.2d 308. See also Syres v. Oil Workers International Union, 350 U.S. 892, 76 S.Ct. 152, reversing 5 Cir., 223 F.2d 739. As to the question of the time for which damages may be recovered, we approve the limit of one year as fixed by the District Court, and this whether under the statute of limitations or the equitable doctrine of laches. See Brotherhood of Locomotive Firemen and Enginemen v. Mitchell, supra; Gardner v. Panama R. Co., 342 U.S. 29, 72 S.Ct. 12, 96 L.Ed. 31.

The judgment is

Affirmed.

[*Dissent*]

BROWN, Circuit Judge (dissenting in part).

I believe that the relief, in this form, and at this time, against the Railway was erroneous. I would therefore reverse as to it.

I accept, however, without restraint or reservation all that is expressed in the District Court's opinion and findings and implied in this Court's per curiam opinion concerning the obvious knowledge by the Railway that the contract[1] and practices were in violation[2] of law and had to be terminated by declaring the contract void as to the future. In this way, following the Steele mandate, the Railway will cease to enjoy any benefit under it.

But the relief[3] did not stop there. Here, the Railway is required to pay (through the incidental money award) vicarious wages back to July 29, 1953, and affirmatively afford equal opportunity for actual employment in each of these jobs for the future. As to the past, the Railway is thus required to pay damages; as to the future, it is compelled to make contracts of employment.

There must be some legal warrant for each of these visitations.

[*Railroad's Duty*]

What duty did the Railway violate? The Brotherhood had, to be sure, the profound obligation fully and earnestly to bargain to prevent, and, where necessary, remove, discriminations. This is found in the unique position of the Brotherhood under the Railway Labor Act to

1. Apparently as early as 1919, the contract was stated in the same terms as in the first overall collective bargaining agreement of January 1, 1927 between Central of Georgia Railway Company and the Brotherhood of Railroad Trainmen, and readopted in successive contracts without negotiation of any kind concerning this issue, down to and including the contract "Schedule of Wages, Rules and Regulations Governing Its Trainmen, Twelfth Edition, effective August 1, 1952," signed by Brotherhood and Railway:

"Article 26.

"Seniority and Filling Vacancies

"(a) When train or yard forces are reduced the men involved will be displaced in the order of their seniority, regardless of color. When a vacancy occurs, or new runs are created, the senior man will have preference in choice of run or vacancy, either as flagman, baggageman, brakeman, or switchman, except that negroes are not to be used as conductors, flagmen, baggagemen or yard conductors.

"(b) Negroes are not to be used as flagmen, except those in that service August 27, 1919, may be retained therein with their seniority rights. White men are not to be used as porters; no porter to have any trainmen's rights except where he may have established same by three months continuously in freight service."

The written contract thus covers specifically the position of the Negro in road service, and, in part at least, as switchmen in yard service. The contract status is not so precise or categorical as to "lister switchmen" but there is no difference in the nature of the discrimination or the available remedies as to this category.

2. The court found as a fact that by the contract and the long continued practices of Brotherhood and Railway, Negroes, otherwise fully qualified to perform the tasks, were unlawfully denied the right to compete for work as flagmen and baggagemen in road service and lister switchmen in yard service.

Brakemen work at the front of the train; they ascend the seniority ladder to (1) flagmen, (2) baggagemen, and (3) conductors. Flagmen work at the rear of a train and understudy conductors. Baggagemen work in the mail car. A white man retains full seniority on each lower job as he progresses up the ladder.

In yard service Negroes and whites compete equally for regular switchman's work. As more white men found yard service attractive, the practice developed of listing on the bulletin (i. e., placing up for bid) switching jobs as "booking and flagging," or as jobs called for switchmen qualified in "booking and flagging," sometimes called "lister switchmen" from the fact that such employees perform certain clerical work, keep simple books, lists of cars and records formerly done principally by yard conductors (foremen). The evidence showed, and the trial court found, that Negroes frequently perform these simple responsibilities in emergencies, occasional holidays when white men are not available, and are in fact fully qualified. The Railway agrees since it contends that Negroes are eligible now and if denied such work, it is inadvertent. The Brotherhood is more fluid on the point, but its attack by specification and brief on lister switchmen is the legal one that this is a Railway Adjustment Board controversy, which has no real basis.

We are in agreement that there can be no real dispute about discrimination in fact on account of race. While Negroes and whites compete equally for brakemen, and a white brakeman of less seniority cannot "roll" (displace) a Negro brakeman with greater seniority, it is entirely possible and a common occurrence for a Negro brakeman to be "rolled" by a white brakeman of greater seniority at the same time a white man, junior to the Negro, is serving on the same train as flagman or baggageman. The result is the same where new jobs as flagman or baggageman open up or persons are working the extra board. In both, the Negro competes only for brakeman while white men junior to him monopolize the other two.

3. The Court enjoined Brotherhood and Railway from enforcing the 1952 contract or operating practices which denied Negroes the right to compete (and train) for these jobs; and affirmatively required each to grant the same seniority rights, training privileges, assignments and opportunities to these jobs as white persons of similar continuous service would enjoy. In addition, as "incidental damages", it awarded the amounts representing the difference between plaintiffs' actual earnings and the respective amounts they would have earned had each of them been assigned jobs and permitted opportunities to train therefor upon the basis of continuous service seniority, together with amounts equivalent to any other losses proximately caused.

bargain for all. But no such duty rests upon the Railway. It has, first, no right whatever to make contracts direct with its employees or groups of them. It is compelled, Sec. 6, Railway Labor Act, 45 U.S.C.A. § 156, to deal with the statutory bargaining representative (Brotherhood) alone.

It could, of course, under Sec. 6 have given notice that the contract should be amended to terminate the discrimination, and had it done so, the Brotherhood presumably would have been obliged to negotiate in good faith on this issue up through the mediation provisions, 45 U.S.C.A. §§ 154, 155, 160.

But the question is: was it bound to do so? To hold that it was is to say that it was on the Railway to make certain that the Brotherhood was fulfilling its statutory obligations. It is to say that in the negotiation process, each proposal must be viewed by the adversary not alone in terms of its own self-interest, but equally in terms of whether the proposing adversary has complied fully with the trust which it owes, not to employer, but to union members and employees affected. It is the genius of the bargaining process that, akin to our Anglo-American adjudicatory mechanism of unfettered advocacy, the safest, surest and best result is achieved when each side, in open, vigorous, unapologetic contention sets forth its claims and demands without stint. The process weakens, it becomes suspect, it invites the necessary intrusion of outside (governmental or otherwise) umpires as enlightened self-interest ceases to be the sole guide. It cannot be that the Railroad shall police the Brotherhood's performance.

So while the Railroad knew all the while that the Brotherhood was not fulfilling its duties, it was not up to it either to demand a change or prick the conscience of its adversary.

If it had no duty to make its adversary bargain better, on what ground can it be made to pay for that which such energetic, conscientious bargaining might have produced?

Nor, it seems to me, does the grant of future relief withstand scrutiny any better. It is, first, of course, a complete by-pass of the whole process of the quasi-voluntary bargaining-mediation mechanism of the Railway Labor Act. Both Brotherhood and employer are left out. The District Judge, as a chancellor, acquires a power to do what no Mediator, Adjustment Board or Emergency Fact Finder is empowered to do—force a labor contract. Indeed, he does it with no semblance of negotiation or mediation—he does it in spite of; he does it over the protest of all but one segment.

[*Congressional Policy*]

It is to infuse with adequate effectiveness by a judicial decree a policy which Congress has repeatedly declined to create by legislation. It is to force an employer to hire persons of a given race for given jobs. That is the aim of proposed Fair Employment Practice Code. Until it is enacted, it is not for government through its judicial arm, or otherwise, to say to this employer: these must be hired. See, Mr. Justice Minton's dissent in Brotherhood of R. R. Trainmen v. Howard, 343 U.S. 768, 775, 778, 72 S.Ct. 1022, 96 L.Ed. 1283, 1289, 1291.

As far as Government can go, is to release the victims of this discriminatory contract from its restraining burden and impose on their vicarious agent the heavy duty of energetic bargaining for all, or even more than what, the Judge gave them. It may be, or we can even assume that it is bound to result, that when the Brotherhood, under the positive mandate to negotiate diligently, marshals all of the tremendous economic pressures, the threats of strikes, and the other forces open to it, it can compel the Railway to open up these very same jobs to equal competition. But if that occurs, it is the result of the bargaining process which Congress has so long nurtured as the basic weapon of the arsenal for industrial peace.

[*Steele Case Distinguished*]

There is a vital distinction between our case and that of Steele, Rolax, and the others: in each of them, the discriminatory contract altered a pre-existing status—a status previously accorded to the affected Negroes by voluntary bargaining. When the offending contract was removed by equity decree, the parties were restored to their former position in which Negroes could perform the jobs (firemen) for which the Railroads had long hired them. But here, once the 1952 contract is discarded as void (as it should be) nothing remains—no former practice—no former implied agreement to accord any of these jobs to Negroes. The slate is clean. The way is open for the future, but there is nothing in the past to revive as the basis for an interim arrangement.

It is plain from my joining in the Court's opinion that I do not accept the contention of Brotherhood or Railway that Steele forbids dis-

criminatory future *changes* alone. The antiquity of the discrimination here, its perpetuation in the contract through successive renewals gives neither the right to demand its continuation. But when it is dissipated, it is not for a Court by coercive decree to fill the void. The contract is removed as an impediment to the statutory scheme. That scheme revives the process of bargaining at that point, and it is for Brotherhood and Railway, not the Court, to make the new agreement.

I therefore respectfully dissent to this extent.

Rehearing denied: BROWN, Circuit Judge, dissenting.

EMPLOYMENT
Labor Unions—Federal Statutes

RICHARDSON et al. v. TEXAS AND NEW ORLEANS RAILROAD COMPANY et al.

United States District Court, Southern District, Texas, March 28, 1956, No. 9240.

SUMMARY: Negro employees of the railroad company in Texas brought a class action in federal district court against the company, the Brotherhood of Railroad Trainmen and local officials of the Brotherhood. The Negro employees alleged that the defendants were unlawfully discriminating on the basis of race against Negro yardmen in filling certain promotional vacancies in violation of the National Railway Labor Act. The Court held that the suit involved the interpretation of the collective bargaining contract and that primary jurisdiction thereof was vested in the National Railroad Adjustment Board. The Court therefore dismissed the case for lack of jurisdiction.

INGRAHAM, District Judge.

This is a suit filed by four plaintiffs who allege that they are Negroes employed as yardmen by the defendant Railroad, suing for themselves and all other Negro yardmen as a class, against Texas and New Orleans Railroad Company, hereinafter referred to as T&NO, and Brotherhood of Railroad Trainmen, an unincorporated association, Bayou City Lodge, No. 145, Brotherhood of Railroad Trainmen, an unincorporated association, L. Bradley, President, Bayou City Lodge, No. 145, Brotherhood of Railroad Trainmen, an unincorporated association, G. M. Leach Lodge, No. 228, Brotherhood of Railroad Trainmen, an unincorporated association, J. N. Hatler, President, G. M. Leach Lodge, No. 228, Brotherhood of Railroad Trainmen, an unincorporated association, Houston Lodge, No. 697, Brotherhood of Railroad Trainmen, an unincorporated association, Elmer Moore, President, Houston Lodge, No. 697, Brotherhood of Railroad Trainmen, an unincorporated association, and W. T. Meredith, Chairman, General Grievance Committee, Brotherhood of Railroad Trainmen, an unincorporated association, hereinafter collectively referred to as B of RT.

Plaintiffs sue "to obtain redress for violation of rights vouchsafed to them by the Railway Labor Act," joining T&NO with B of RT and certain lodges and officers of that organization as co-defendants. The complaint alleges (a) that plaintiffs are Negro yardmen employees of T&NO who are represented for collective bargaining purposes by the B of RT; (b) that the B of RT has discriminated against plaintiffs in its representation of them, solely on account of color, and that plaintiffs were originally employees of H&TC and HE&WT Railroads, whose operations were consolidated with those of T&NO many years ago, since which time plaintiffs have been designated as "H&TC Protected Men" while yardmen employees of other companies in the merger were designated as "T&NO Protected Men", the former group being all Negroes and the latter all white; (c) that during all the time since the merger "many years ago" an arrangement or practice existed whereby H&TC Protected Men acted as engine foremen of crews consisting of H&TC Protected Men only, but whenever a T&NO Protected man was moved in on an H&TC Protected Man crew to

fill a temporary vacancy, the T&NO man acted as foreman, even though of less seniority and no more qualification than the H&TC men; (d) that on September 25, 1952, the B of RT entered into a "collective bargaining agreement" with T&NO providing that such long standing past practice would be continued; and (e) that this practice, as "perpetuated" in the 1952 agreement is discriminatory and void, and the B of RT has not represented the plaintiffs as required by law. The prayer in the complaint is for a declaratory judgment that the 1952 agreement is void insofar as it discriminates, for injunction against all defendants from enforcing the agreement and against the B of RT from representing plaintiffs as long as it does so with discrimination, and for compensatory damages for plaintiffs against all defendants and punitive damages against the B of RT.

The case is now before the court on motions to dismiss (1) by T&NO and (2) by B of RT.

[*Collective Bargaining Agreement*]

It is clear from the complaint, and even more so when reference is had to the facts established by supporting affidavits, that plaintiffs are contending that a practice of filling vacancies in the engine foreman classification, now carried into the written agreement between the carrier and the union representative, is discriminatory and therefore unlawful and void. A disposition of this contention calls for an interpretation or application of the agreement, and involves a dispute between employees and the carrier-employer under Section 3 of the Act. There is no allegation in the complaint that plaintiffs have ever, prior to the filing of the complaint in this case, complained to the B of RT or to T&NO of the application of the practice in question as being discriminatory to them. The affidavits on file negative any inference that such a complaint has been made to either the representative or the carrier. Plaintiffs say there is no administrative remedy available to them but they have not sought to process any alleged complaint or cause of action through any of the processes available to them under the Railway Labor Act. Any dispute alleged in the complaint is a dispute between the carrier and its employees which is clearly a matter for exclusive determination, at least in the first instance, by the National Railroad Adjustment Board.

[*Legislative History*]

The history of the Act is traced by the United States Supreme Court in General Committee v. M-K-T Railroad Company, 320 U.S. 323, at pages 328-33, 13 LRRM 627, and the cases cited therein. The court there observed that, historically, the present Act and its predecessors placed great areas of dispute within the field of negotiation supplemented by mediation and conciliation, to enforce the Congressional policy. The court then observes, as follows:

> "Congress established the National Railroad Adjustment Board for the settlement of specific types of disputes or grievances between employees and the carrier, Sec. 3. And Congress gave the courts jurisdiction to entertain suits based on the awards of the Adjustment Board, Sec. 3, First (p). That feature of the Act, as well as Sec. 2, Ninth, which placed on the Mediation Board definite adjudicatory functions, transferred certain segments of Railway labor problems from the realm of conciliation and mediation to tribunals of the law.
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> "In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compusions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. The inference is strong but [sic] Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.
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> "That history has a special claim here. It must be kept in mind in analyzing a bill of complaint which, like the present one, seeks to state a cause of action under the Railway Labor Act and asks that judicial power be exerted in enforcement of an obligation which it is claimed Congress has created."

In the General Committee v. M-K-T case, the

court was confronted primarily with a question of a jurisdictional dispute under Sec. 2, Ninth of the Act and held that Congress did not select the courts to resolve them; rather, the court said, an administrative remedy is fashioned under the National Mediation Board and the administrative remedy is exclusive (p. 336). In concluding, the court stated:

> "Rather the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability.
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> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. * * * Courts should not rush in where Congress has not chosen to tread." (p. 337)

Also cited are Switchmen's Union v. National Mediation, 320 U.S. 297, 13 LRRM 616; Brotherhood of Railroad Trainmen v. Toledo, P. & W. Railroad, 321 U.S. 50, 13 LRRM 725; and Bradley Lumber Company v. N.L.R.B., 34 F.2d 97,100, 1 LRRM 257 (5th Cir., 1936).

[*Prior Cases*]

In a case decided in this district last year, involving the identical question, relating to the Brotherhood of Railroad & Steamship Clerks, Freight Handlers' Express and Station Employees, it was held by Judge Kennerly in J. D. Conley, et al., v. Pat J. Gibson, et al., Civil Action 8443, that the court was without jurisdiction, affirmed by Per Curiam Opinion of the United States Court of Appeals, Fifth Circuit, J. D. Conley, et al. v. Pat J. Gibson, et al., 229 F.2d 436.

And finally, quoting Judge Hutcheson in the case of Hampton, et al. v. Thompson, et al., 171 F.2d 535, 23 LRRM 2151 (5th Cir., 1948):

> "What and all that is for decision here, then, is whether the fact that appellants are Negroes and members of an all Negro railway labor union, entitles them, the Railway Labor Act notwithstanding, to bypass the National Railroad Adjustment Board and sue direct in the federal courts upon grievances with their employer.
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> "(2) Constitutional amendments and federal statutes, dealing with race or color, were written, they have been interpreted and applied, not to discriminate in favor of Negroes, but to prevent discrimination against them, not to make, but to prevent, a different rule for Negroes than for Whites. On page 2 of their reply brief, appellants say: 'It is not necessary to prove that the individual members of the First Division have prejudice against Negroes or that the particular award was the product of prejudice. All appellants have to prove is that the structure of the First Division is fatally tainted with race discrimination.' When this statement is read in the light of the undisputed facts, indeed the facts admitted and found on this record, it is at once apparent that appellants are using an ancient device, assuming a situation favorable to themselves, in order to get a favorable judgment, In short, begging the question, they put a straw man up to knock him down. The dispute here involves no racial element whatever. The fact that the brakemen in one group are Negroes, in the other whites, has no bearing on the demands of the B.R.T. lodges that they be allowed to run off accumulated mileage, none on the insistence of the colored railway trainmen that none of them should be displaced.
>
> "The doctrine, that in circumstances of this kind a person is entitled to a special tribunal or special treatment because of the color of his skin, has never prevailed in this country, in or out of the courts. If the position taken here should be sustained, the United States and every state must redraft all its laws, remake all its

appointments. To say, as appellants in effect say here, that whenever a Negro, not as a Negro but as a person, is concerned in a controversy, he may call in question not the actual prejudice against him of those who are to hear it, but the fact that the hearers have been selected from white organizations which do not admit Negroes to membership, is to introduce a new and strange doctrine. It would be impossible to conform to it. Contrary to the principle of democracy in America, the spirit of its laws, it would be as stupid as it would be wicked to conform to it if conformity were possible. The judgment is affirmed."

I conclude that this court is without jurisdiction and that the motions to dismiss should be granted and sustained. This renders consideration of the other pending motions unnecessary.

TRIAL PROCEDURE
Evidence—Mississippi

S. L. ELLIS v. STATE of Mississippi

Supreme Court of Mississippi, April 2, 1956, 86 So.2d 330.

SUMMARY: The appellant, a Negro, was convicted of assault and battery with intent to kill in a state circuit court. On appeal to the Mississippi Supreme Court the appellant assigned as error, *inter alia*, the admission, as evidence at his trial, of a letter. The letter had been written by the appellant to his brother while he was in jail awaiting trial and given to his mother to mail. It was taken from the mother by a jailer and introduced at the trial by the state. The letter contained a statement which indicated that the appellant believed he was a victim of racial prejudice, as well as a partial admission of his guilt of the offense charged. The introduction of the letter as evidence was objected to by the appellant at the trial on grounds that it had no probative value as to his guilt and was highly prejudicial and inflammatory because it injected the question of racial prejudice into the trial. The court found no error in the admission of the letter, holding that its production was not the result of an unlawful search or seizure, that it was relevant as to appellant's guilt, and that the appellant himself was responsible for raising the issue of racial prejudice, having written the letter. A portion of the court's opinion, by ETHRIDGE, J., follows:

The appellant, S. L. Ellis, was convicted in the Circuit Court of the Second Judicial District of Jones County, of assault and battery with intent to kill and murder Thomas Hinton. There is ample evidence to support the verdict of the jury in finding him guilty as charged.

* * *

While appellant was in jail after being charged with the assault and battery upon Hinton, he wrote a letter to his brother in Newark, New Jersey. Its substance is that "These white people (are) kicking niggers" around. "But you know I don't stand for that type of carrying on. I have to make a few changes. By the way I'm in the can Doc and I. We done one of these jokes up pretty bad. They tried to charge us with a couple of phony charges. As soon as we beat this rap, will be on up the way." The balance of the letter told his brother that when he got out of jail, he was going to buy some tires for his car and drive up to see him. This letter was handed by appellant to his mother who came to visit him in jail. He said that he gave her the money to put a stamp upon it. He admitted that he had written the letter. His mother did not testify.

Clarence Goodson, deputy sheriff and jailer of Jones County, had charge of the prisoners. He testified that he observed that appellant's mother had this letter; that he asked her for it, and she voluntarily handed it to him; that without obtaining her or the appellant's consent he opened it and transmitted it to the prosecuting attorneys. Goodson said that as jailer of Jones County, he censors the mail that goes in and out of the jail from and to prisoners, for his own protection and the protection of prisoners, and in order to be able to properly detain them; and that there was no stamp on the letter which appellant's mother handed him.

[*Admission of Letter*]

Appellant's counsel at the trial objected to introduction of this letter in evidence, on the grounds that it was obtained by an unlawful search and seizure, it was irrelevant, immaterial and of no probative value on appellant's guilt, and it was highly prejudicial and inflammatory because it injected into the trial the question of race prejudice. The trial court overruled the objections, and held that the letter was voluntarily written by defendant, that the officers had a right to intercept mail coming in and out of prison to and from prisoners; and that the letter came into possession of the prison officials "under an established practice of reasonable necessity to promote the safeguarding of the jail." Appellant then made a motion for a mistrial, which was overruled.

* * *

These principles are directly related to the instant facts and to the holding in Stroud v. United States. Appellant voluntarily wrote the letter, and under the rules of the prison in which he was incarcerated the letter was handed to the jailer. He transmitted it to the district attorney. The letter came into the possession of the officials under an established practice reasonably designed to promote the discipline of the institution. For these reasons, there was no unreasonable search and seizure or any violation of appellant's privilege against self-incrimination.

[*Relevance*]

The letter was relevant and of probative value on the issue of appellant's guilt, although it unfortunately stated facts which might indicate that appellant thought he was a victim of racial prejudice. That matter was not injected into the case by the State, but by the appellant's own voluntary action in writing the letter. Moreover, the verdict does not indicate in any respect that the jury was prejudiced against him. Appellant received a fair trial, and the great weight of the evidence supports his conviction.

Affirmed.

McGEHEE, C. J., and KYLE, ARRINGTON and GILLESPIE, JJ., concur.

TRIAL PROCEDURE
Juries—Mississippi

Robert Lee GOLDSBY v. STATE of Mississippi

Supreme Court of Mississippi, March 5, 1956, 86 So.2d 27.

SUMMARY: Goldsby, a Negro, was convicted of murder in a trial court in Mississippi. His conviction was affirmed by the Mississippi Supreme Court. 78 So.2d 762 (1955). Thereafter he petitioned the United States Supreme Court for a writ of certiorari, alleging for the first time a denial of the equal protection of the laws in that Negroes had been systematically excluded from jury service in the county in which he was tried. The United States Supreme Court denied the petition. 350 U.S. 925 (1955). Goldsby then petitioned the Mississippi Supreme Court for leave to file a writ of error coram nobis on the grounds of newly discovered evidence and the denial of his federal constitutional rights through the exclusion of Negroes from jury service. The Court held, as to the denial of constitutional rights, that this issue was raised too late and further that there was no evidence of such a systematic exclusion of Negroes from jury service. A portion of the opinion of the Court, by HALL, J., follows:

The appellant, Robert Lee Goldsby, was convicted of murder in the Circuit Court of Carroll County, Mississippi, at the November 1954 term. On appeal to this Court his conviction was affirmed on March 28, 1955. Goldsby v. State, Miss., 78 So.2d 762, not yet reported in the State Reports. Thereafter he petitioned the United States Supreme Court for a writ of certiorari, and the prayer of his petition was denied on December 12, 1955. 350 U.S. 925, 76 S.Ct. 216, 100 L.Ed. —. On January 16, 1956, this Court fixed the date of his execution for February 24, 1956. Goldsby v. State, Miss., 84 So.2d 528.

On February 21, 1956, the appellant Goldsby

filed in this Court pursuant to Chapter 250, pages 281-282, Laws of 1952, a petition for writ of error coram nobis. On the same day, the date for execution of the sentence being only 3 days distant, we entered an order pursuant to the provisions of Section 8 of said Chapter 250 staying the execution of the sentence until further order of this Court and we set the hearing of the petition for February 28, 1956, in the Supreme Court room in the City of Jackson, Mississippi. On the appointed date counsel for the appellant and for the State appeared and argued the petition. The petition is divided into two general sections, the first being on the ground of newly discovered evidence, and the second being on the denial of federal constitutional rights. At the argument, counsel for the petitioner-appellant stated orally to the Court that he would abandon that part of his petition directed to newly discovered evidence, but since there is no official record of such abandonment, we deem it necessary to deal with that ground as well as the second ground.

* * *

The second section of the petition before us is based upon the grounds of the denial to petitioner of federal constitutional rights consisting primarily of the alleged fact that the petitioner is a member of the Negro race and that in the county where he was tried Negroes have been systematically excluded from jury service. So far as the whole record before us is concerned, including both that of the original trial and of the petition now before us, there is no showing whatsoever that Negroes are or have been systematically excluded from jury service in the county where he was tried. So far as we know from the record of the trial, there may have been Negroes on the grand jury which indicted petitioner and there may have been Negroes on the jury which convicted him. The record is wholly silent as to this matter. So far as it shows petitioner was indicted and tried by a fair and impartial jury and we cannot take judicial notice of something as to which there was no proof whatsoever.

[*Petition to U. S. Supreme Court*]

After this case was originally decided by us on March 28, 1955, and the suggestion of error overruled on May 2, 1955, petitioner applied to the United States Supreme Court in Cause No. 279 on the docket of said court at the October Term 1955, and at that time, as shown by the original petition on file with the Supreme Court of the United States, he raised this identical question, and that court denied certiorari as hereinabove referred to and we think that the judgment of that court constitutes res adjudicata and that the question is no longer subject to review.

Petitioner alleges that his attorney prepared and had ready to file a motion for a change of venue and a motion to quash the indictment, and that these documents were in his hands, already prepared and ready for filing, on November 10, 1954, and there was also already prepared and in his hands a petition for removal of this cause to the federal court under the provisions of Title 28, § 1443 and Sections 1446-1449 of the United States Code Annotated, and this petition was ready for filing and the affidavit thereon had already been executed on November 9, 1954. It appears that on that date the mother, brother and aunt of the petitioner, being then disatisfied with the services of the attorney who had allegedly been employed by petitioner's aunt in Gary, Indiana, employed other counsel to represent petitioner, and thereafter on November 10, 1954, which was two days after petitioner's indictment, his Chicago counsel withdrew from the case without filing the documents which he had prepared and which he had in hand, and abruptly left Mississippi and returned to his home in Chicago, notifying the trial court that he was no longer connected with the case. None of the documents which the Chicago attorney prepared were ever filed in or brought to the attention of the trial court. Prior to the preparation of these documents the attorney from Chicago on November 8, 1954, had requested the trial court to grant him additional time in which to prepare his motion and petitions, and the trial court had granted him two days in which to do this work and had stated to him that he would give him a hearing on any motions or petitions which he desired to file.

After the withdrawal from the case of the Chicago attorney the court appointed a local attorney to defend petitioner, who, together with the employed attorney from Vicksburg, Mississippi, who had been hired by petitioner's relatives, and a review of the record of the trial of this case shows that both of these attorneys, who are thoroughly competent and who stand high among the legal profession in Mississippi, did an excellent job in the defense of

this case, not only at the trial in the lower court but also on the appeal to this Court.

We may here observe that a similar motion to quash the indictment and also a motion for a change of venue, were filed by other counsel in the case of Robert Gillian, a colored man who was present at the time of the killing in question and who had been indicted by the same grand jury as an accessory after the fact. Copies of those motions as well as copy of a petition for removal to the federal court which was not filed, are exhibits to the petition now before us, but the record shows that after the trial of petitioner Goldsby the court dismissed the proceedings against Robert Gillian for the reason that the evidence brought out upon the trial of Goldsby was insufficient to make a case on the indictment against Gillian.

[*Jail Confinement*]

There is much said in the petition now before us about petitioner being confined in a jail at Louisville, Mississippi, and not at Vaiden, the county seat of Carroll County, where petitioner was tried. According to the last federal census Vaiden is a little town of 583 population. According to the record before us there is no jail in Vaiden and no place where petitioner could have been there incarcerated. Section 2499 of the Mississippi Code of 1942 provides that the presiding judge of the county may, either where there is no jail sufficient for the safe keeping of the prisoner, or, where the circuit judge think it expedient, on the grounds of public policy, so to do, it shall be his duty to make an order for the removal of the accused to the most convenient and safe jail of some convenient county. The record shows that such an order was entered by the circuit judge in this case directing the accused to be kept in jail at Louisville, Mississippi. This order was fully authorized by the statute and there was no error in its entry. The present counsel for petitioner complains that his opportunity for conferring with his client was very limited. The record shows however that when that attorney appeared in Vaiden and requested the privilege of conferring with his client, the circuit judge immediately directed that the prisoner be brought to Vaiden and the judge set aside a room in the courthouse where no one was present except the accused and his present attorney, and gave them unlimited time for conference. After that attorney had withdrawn from the case and had returned to Chicago he wrote letters both to the circuit judge and to the district attorney and thanked them for the many courtesies extended to him while he was in Mississippi.

Petitioner complains that it was not possible for him to file his motion to quash the indictment and his motions raising federal constitutional questions before the return of the indictment. We have repeatedly held that in cases involving federal constitutional questions it is not necessary that such motions be made before the return of the indictment where the accused has been denied reasonable opportunity for doing so, and the circuit judge in this case, in recognition of those decisions, granted the petitioner additional time in which to prepare and file his motions and petitions.

We come now to the main question relied upon by petitioner, which is the denial of his constitutional right by the systematic exclusion of Negroes from jury service. As heretofore pointed out this question was raised before the United States Supreme Court in the petition for certiorari after the final disposition of this case on the merits by this court. It was not raised in the lower court nor in this court on the appeal on the merits, and it is our view that the raising of the question by petition for writ of error coram nobis at this time comes entirely too late. It should have been raised in the lower court. 50 C.J.S., Juries, § 263, p. 1024 says: "A challenge to the array or a motion to quash the venire should be made at the first opportunity, or as soon as the facts which warrant it are known, or, if the time is regulated by statute, it must be filed within the time so limited."

[*Good Faith Preserved*]

The same text on the same subject in § 265, at page 1026 says: "It will be presumed, in the absence of evidence to the contrary, that the officers charged with the duty of selecting, drawing, and summoning the jury have acted faithfully and according to law, and the burden of showing the contrary is on the challenging party."

In 1 A.L.R.2d, beginning at page 1291, there is a lengthly annotation on the subject now before us. In Section 2 of that annotation it is said: "Of course, the mere allegation of discrimination against an eligible class or race as regards selection for jury service is not proof in itself of the presence of such discrimination.

And the burden of proof to sustain the contention is upon the one making the allegation—usually the defendant."

In Section 3 of the same annotation in 1 A.L.R.2d, beginning at the bottom of page 1293 and continuing to page 1294, it is said: "Contentions that an eligible class or race has been excluded from the jury in a criminal case, or that it has been discriminated against in that regard, usually are raised by, or on behalf of, the defendant. Mere allegations are not sufficient in and of themselves to sustain such a contention, and the burden of proof to show an alleged discrimination in the selection of the grand or petit jury, or of the jury list or panel, is on the one making the allegation."

To support the statement in this annotation there are cited eight cases from the Supreme Court of the United States together with authorities from sixteen other states as well as the District of Columbia. We repeat that there is no showing whatsoever in the proceeding now before us or in the record of the original trial that Negroes have been systematically excluded from jury service in Carroll County. The most that can be said is that there are general allegations to that effect in the petition which we now have under consideration, but there is not the slightest proof by affidavit or otherwise to support these conclusions. It necessarily follows, therefore, that the petition for leave to file a writ of error coram nobis must be denied.

[*Petition For Habeas Corpus*]

There is an additional prayer to the petition now under consideration that if we should conclude to deny the petition for the filing of the petition in the lower court as provided by said Chapter 250 of the Laws of 1952, that the petition should then be considered by us as a petition for a writ of habeas corpus. Section 2816 of the Mississippi Code of 1942 specifically provides that habeas corpus should not be granted on the petition of any person suffering imprisonment under lawful judgment. From a review of the entire case, including the record of the original trial and what has heretofore been adjudicated by this Court and by the Supreme Court of the United States, we conclude that the petitioner is imprisoned under lawful judgment and that therefore the alternative prayer should be denied.

Chapter 250 of the Laws of 1952, in Section 8, provides that where there has been an automatic stay of execution and the application for a writ of error coram nobis shall be denied, then the tribunal having jurisdiction of such application or petition shall forthwith fix a date, not more than twenty-one days distant, for the execution of the sentence, and that mandate or warrant shall forthwith issue accordingly. Pursuant to the terms of said Section 8, the date of the execution of the death sentence upon petitioner is hereby fixed for Friday, March 23, 1956.

Petition denied and Friday, March 23, 1956, set for date of execution. This proceeding has been considered by the Court en banc and all nine Justices of the Court concur.

CIVIL RIGHTS STATUTES
State Action—Texas

Leona DINWIDDIE v. R. J. BROWN et al.
Anne Elizabeth ROARK v. Gordon T. WEST et al.

United States Court of Appeals, Fifth Circuit, March 7, 1956, 230 F.2d 465.

SUMMARY: In two damage actions begun in federal district court in Texas, Negro plaintiffs had alleged violations of the federal Civil Rights Acts. The complaints filed alleged that the plaintiffs owned and were in possession of certain real property; that the defendants, some as private persons and some as state officials, acting under state laws, had conspired to deprive the plaintiffs of their federally guaranteed civil rights by ejecting the plaintiffs from their property. The complaints alleged that the ejectments were made following court action enforcing fraudulent title and mortgage claims, and that the plaintiffs, as Negroes, were deprived of the equal protection of the laws because of Texas' segregation laws. The United States

District Court dismissed the action and the plaintiffs appealed to the Court of Appeals, Fifth Circuit. That Court held that in the absence of allegation of facts indicating that the defendant state officials had acted otherwise than in the ordinary performance of their duties in serving process and levying execution on the property, no federal question was involved. The dismissal was affirmed.

Before BORAH, TUTTLE and BROWN, Circuit Judges.

PER CURIAM:

The sole question presented by these appeals is whether the complaint in either of the two actions involved here states a claim within the jurisdiction of a federal court, in the absence of diversity of citizenship. Although the cases are in most respects different from one another, they were both brought for alleged violations of the civil rights statutes,[1] and were dismissed on identical grounds: for a failure to state the allegation material to the theory of recovery in each case, that the defendants "entered into a conspiracy to rob, cheat, defraud or deny to the plaintiff any right secured to her by the Constitution and laws of the United States or that the Plaintiff was denied due process of law or the equal protection of the laws cognizable under the Constitution and laws of the United States and under the Civil Rights Acts."

[*Dinwiddie Case*]

The complaint in the Dinwiddie case alleged that the plaintiff and her son in July, 1945 bought certain described property in Wichita Falls, Texas, and occupied the same as their homestead; that the defendants unlawfully conspired to defraud plaintiff of her rights as a citizen, in violation of the civil rights acts and of the Fifth and Fourteenth Amendments of the Constitution; and that while she was lawfully seized of her property, the defendants, acting under color of state law, unlawfully entered upon the land and unlawfully ejected the plaintiff therefrom. Court II alleged generally that the defendants, while acting under color of state law, unlawfully conspired to defraud the plaintiff of her rights as guaranteed by the Fifth and Fourteenth Amendments of the Constitution and the civil rights acts.

Two[2] of the seven defendants named in the complaint did not file any pleading in opposition thereto. Defendant Crowell filed exceptions to the complaint. Defendants Brown and Johnson filed individual answers and also individual motions to dismiss for lack of jurisdiction and for failure to state a claim upon which relief could be granted. Defendants Bailey and Elder made similar motions. Each of the motions to dismiss was supported by affidavits and exhibits attached thereto. The plaintiff then submitted her own, "Affidavit Against Motion to Dismiss and Summary Judgment" and the district court, considering both the pleadings and the affidavits and exhibits filed in support thereof, granted a motion to dismiss as to all the named defendants, for failure to state a claim upon which relief could be granted.

It is clear that although the order of dismissal stated that it was granted on a motion to dismiss for failure to state a claim upon which relief could be granted, the district court's failure to exclude affidavits and exhibits offered in support of the motion converted it into a motion for summary judgdment.[3]

The plaintiff's affidavit, in material part, averred that the state of Texas has laws segregating white and Negro citizens and that white supremacy is the policy of the state; that as a result of such policy, "a Negro's word is considered as naught as against a white citizen's word"; and that "[t]he total result of this policy and practice [is that] a Negro, and this plaintiff is a Negro, cannot and does not obtain the equal rights, privileges and immunities as white citizens guaranteed citizens of the United States by the Act of Congress and the Constitution of the United States, but are denied same with impunity, and the rights of Negro citizens are wholly ignored."

The defendants' affidavits and exhibits stated, in brief, that the plaintiff and the defendant Brown were in dispute over the title to the

1. 42 U.S.C.A. §§1981-1983 and 1985(3) are the applicable sections, according to the complaints.
2. J. C. Berville and Grady Harrist.
3. Rule 12(b) of the Federal Rules of Civil Procedure provides, in part: "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56."

property described in the complaint, and that Brown brought a trespass to try title suit in state court against the plaintiff, who appeared and contested Brown's claim; the judgment was entered for Brown; that service of process in the state suit was made through the office of the sheriff of Wichita County, Bailey, and the writ of possession issued after final judgment was executed by a deputy of constable Elder. After obtaining possession, Brown sold the property to Johnson. It is not shown what connection, if any, the defendants Crowell, Berville, and Harrist had with the state action, or with this case.

[*Roark Case*]

Complainant Roark instituted her action about a month after the commencement of the Dinwiddie case. She alleged that she was seized of described property in Wichita Falls, as a residential and business homestead, when the defendants, acting under color of state law, unlawfully entered upon her land and unlawfully ejected her therefrom; that the defendants conspired to defraud her of her rights as a citizen, while acting under color of state law, and effectuated such conspiracy by the defendant West's taking "fictitious" deeds of trust on her property for large sums of money never in fact advanced to the plaintiff, the defendants well knowing the same to be void as to plaintiff's homestead; that the defendants robbed, cheated, and defrauded the plaintiff of large sums of money; and that Texas has segregation laws, which make it impossible for the plaintiff, a Negro, to have equal rights as a Citizen. Count II in essence repeated the same allegations, particularly with regard to segregation, concluding, "because of this segregation and discrimination policy of the state of Texas, and these defendants, the defendants have violated the plaintiff's civil rights," to her damage in the sum of $250,000. Count III alleged that the plaintiff and West entered into an oral agreement whereby he was to take over her property and liquidate the debts against it for their mutual benefit, but that he later changed his mind and conspired with the other defendants to defraud her of her constitutional rights.

Defendants West and Rogers filed a joint answer, and defendant Castledine a separate answer, to the complaint. In addition, these defendants filed several motions, supported by affidavits and exhibits, among which was a motion to dismiss for failure to state a claim upon which relief could be granted and a motion for summary judgment. Defendants Johnson, Elder, and Watkins moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim upon which relief could be granted. In reply thereto, the plaintiff filed her "Affidavit Against Summary Judgment." After a hearing, the court entered an order of dismissal as to all defendants on the ground that the complaint failed to state a claim upon which relief could be granted.

[*Dismissal Below*]

Since a motion for summary judgment had been made, the court could not, of course, exclude affidavits filed in support of and in opposition to the motion. Rule 56(b), F.R.C.P. Nor was the motion to dismiss for failure to state a claim upon which relief could be granted thereby waived or converted into a second motion for summary judgment. It could be considered by the court without reference to the affidavits and exhibits, and if granted on the complaint standing alone, we must review the question from the same point of view. Moffett v. Commerce Trust Co. (8 Cir.), 187 F.2d 242. The form of the order would not be decisive. Lane Bryant v. Maternity Lane, Ltd. (9 Cir.), 173 F.2d 559. Nevertheless, it is clear from the terms of the order, quoted above, that the court dismissed the complaint in this case because on its face it failed to state a claim upon which relief could be granted.

The language of both orders of dismissal likewise indicates that in granting the defendants' motions to dismiss in these cases, the district court did so not upon the ground that no cause of action was set out in the complaints and in Dinwiddie's accompanying affidavit, but upon the ground that no federal cause of action was stated therein. There being no diversity, our review of the orders of dismissal must follow the same course.

[*Civil Rights Acts*]

In this regard, it is irrelevant whether an action of trespass to land is set out, or a fraudulent mortgage foreclosure alleged, unless the trespass or fraud amounted to a purposeful and unlawful discrimination against these plaintiffs because of their race by persons acting under color of state law. The fact that the effect of the obtaining of a fraudulent foreclosure is to

deny a plaintiff the equal protection of the laws does not present a federal question. Campo v. Niemeyer (7 Cir.), 182 F. 2d 115. It is likewise clear that if in connection with a defendant's scheme to defraud by the use of a false deed of trust, state officers acting within the scope of their authority issue process or levy execution, the nature of the cause of action is in no way altered.

This is not to deny that if state officers conspire with private individuals in such a way as to defeat or prejudice a litigant's rights in state court, that would amount to a denial of equal protection of the laws by persons acting under color of state law.[4] It is another matter, however, where they act wholly within their official responsibilities and do not intentionally cooperate in any fraudulent scheme. In such a case, the tort is solely that of the private individuals, and redress of the wrong rests with the state courts. Collins v. Hardyman, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253.

Here the only defendants who acted under color of state law were the state officers who issued process and levied execution in the Dinwiddie case, and we may presume for the sake of argument, did the same in the Roark case. Although both complaints alleged generally that all the defendants conspired to deprive the respective plaintiffs of the equal protection of the laws, there is no allegation that the state officers named therein acted to the plaintiffs' damage in any manner other than in the ordinary performance of their duties. Merely characterizing their conduct as conspiratorial or unlawful does not set out allegations upon which relief can be granted. Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497; McGuire v. Todd (5 Cir.) 198 F.2d 60; Morgan v. Sylvester (D.C., S.D.N.Y.), 125 F.Supp. 380.

Stripping the complaints of this verbiage, there is left, at most, only the allegation of the obtaining of a fraudulent judgment by private individuals, and the completely extraneous allegation that Texas' segregation laws operate to deprive these plaintiffs of their constitutional rights. The two real property actions in question here had no connection with the enforcement of such laws. Likewise the allegation that as a result of these laws an attitude of white supremacy is fostered, tending to degrade the Negro and make his oath worthless in state court, is totally beside the point because there is no allegation that any Negroes testified in the state actions, on either side, or even that these plaintiffs were in any way prejudiced in these particular actions because of their race. Rather, the allegations appear to have been inserted in each complaint merely to give a state cause of action the appearance of a suit under the civil rights acts. The circumstance that the parties were of different races could not, of course, operate to convert these torts into federal causes of action.

The judgments are
AFFIRMED.

4. We do not reach the question whether, before one is entitled to relief in the federal courts under the civil rights acts, he must allege an exhaustion of state remedies. See Cobb v. City of Malden (1 Cir.), 202 F. 2d 701; Cooper v. Hutchinson (3 Cir.), 184 F. 2d 119.

CORPORATIONS
NAACP—Louisiana

State of LOUISIANA ex rel. Fred S. LeBLANC, Attorney General v. John G. LEWIS et al.

19th Judicial District Court, Parish of East Baton Rouge, Louisiana, April 24, 1956, No. 55,899.

SUMMARY: The State of Louisiana, on the relation of the state attorney general, brought suit in a state court against the National Association for the Advancement of Colored People and individual members and officers of that organization in Louisiana. The suit sought an injunction against the N.A.A.C.P. and its officers and members in Louisiana restraining them from conducting any activities as such Association in that state because of the alleged failure of the Association to comply with Louisiana statutory requirements regarding registration

and filing of membership lists[a]. Following an initial hearing a preliminary injunction was issued as prayed for. On default of appearance of the defendants at the hearing on the final decree, judgment was entered against the defendants and the injunction was made final. The order of the Court on the final decree is set out below. Following it there is reproduced the petition of the Attorney General. (While this case was pending in the Louisiana state court a federal district court declined to restrain further action in the state court. See p. 576).

LINDSEY, J.

On motion of Fred S. LeBlanc, Attorney General, W. M. Shaw, Special Assistant Attorney General and Sargent Pitcher, Jr., attorneys for the State of Louisiana, plaintiff in injunction, and on producing due proof in support of its demand, the law and evidence being in its favor for reasons this day orally assigned:

It is ORDERED, ADJUDGED AND DECREED that the default entered herein on April 10th, 1956, against The National Association for the Advancement of Colored People on the petition seeking a permanent injunction, be now confirmed and made final, and accordingly, that the acts complained of therein, be decreed to be injurious to the State of Louisiana, plaintiff, an impairment of its rights under and a violation of its laws and more especially Title 12, Chapter 5, of the Louisiana Revised Statutes of 1950.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the plaintiff, the State of Louisiana, and against the defendant, The National Association for the Advancement of Colored People, forever enjoining, restraining and prohibiting the defendant, or any of its branches, subdivisions or subordinate bodies located in this state, or any of its agents, employees, or any other persons,

a. Title 12, Sections 401, 402, 403, and 405 of the Louisiana Revised Statutes of 1950 provide:

§401. Filing list of members and officers; failure to file

The principal officer or officers for this state, if there be such officer or officers, of each fraternal, patriotic, charitable, benevolent, literary, scientific, athletic, military, or social organization, or organization created for similar purposes, whether incorporated or unincorporated, operating in this state, with the exception of those hereinafter specifically excepted, shall file with the Secretary of State annually, between December 16th and December 31st inclusive, of each year, a full, complete and true list of the names and addresses of all of the members and officers of the organization living or residing in this state who are members at the time of the filing of the list, and of all those who have been members thereof at any time during the preceding period as defined in R.S. 12:407. These lists shall be certified under oath by the principal officer or officers. Any officer of such organization who fails to comply with the provisions of this Section shall be imprisoned not less than sixty days nor more than six months.

§402. Filing list of members and officers of subdivision or subordinate body; failure to file

The principal officer of each subdivision or subordinate body located in this state of each fraternal, patriotic, charitable, benevolent, literary, scientific, athletic, military, or social organization, or organization created for similar purposes, whether incorporated or unincorporated, operating in this state, with the exception of those specifically excepted, shall file with the Secretary of State annually, between December 16th and December 31st, inclusive of each year thereafter, a full, complete and true list of the names and addresses of all of the members and the officers of such subdivision or subordinate body of such organization who are members at the time of the filing of said list, and of those who have been members thereof at any time during the preceding period as defined in R.S. 12:407. These lists shall be certified under oath by the principal officer or officers. Any such officer of such subdivision or subordinate body of such organization who fails to comply with the provisions of this section shall be imprisoned for not less than sixty days nor more than six months.

§403. Meetings prohibited unless membership list has been filed; penalty for violations

A. Every member of any fraternal, patriotic, charitable, benevolent, literary, scientific, athletic, military, or social organization, or organization created for similar purposes, whether incorporated or unincorporated, operating in this state, with the exception of those hereinafter specifically excepted, or of any subdivision or subordinate body thereof, is hereby prohibited from holding, assisting in holding, or attending any assembly, meeting, or gathering of such organization or of any subdivision or subordinate body of such organization unless a list of the officers and membership of the particular subdivision or subordinate body of such organization holding such assembly, meeting or gathering or within whose territorial jurisdiction said assembly, meeting, or gathering is held has been filed with the Secretary of State as required by R.S. 12:402, and unless, in cases where there is a principal officer or officers for this state of such organization, there has been also filed with the Secretary of State a list as aforesaid of all of the members and officers of such organization living or residing in this state as required by R.S. 12:401.

B. If any member of such organization, or of any subdivision or subordinate body thereof, violates the provisions of this Section he shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars or more than five hundred dollars or imprisoned for not less than thirty days or more than six months, or both.

§405. Attorney General to dissolve organization and prevent meetings

The Attorney General shall proceed by injunction or otherwise to dissolve any organization or subdivision or subordinate body violating the provisions of this Chapter and to prevent any meeting of the officers and members thereof until they have complied herewith.

firms or corporations acting or claiming to act in its behalf, from holding any meeting of the officers and/or members of the said The National Association for the Advancement of Colored People in the said State of Louisiana, and further permanently enjoining, restraining and prohibiting the said defendant, The National Association for the Advancement of Colored People, or any of its branches, subdivisions or subordinate bodies located in this state, from doing any business or acting as a corporation in the State of Louisiana.

Judgment read, rendered and signed in open court on this 24th day of April, 1956.

PETITION

TO THE HONORABLE, THE JUDGES OF THE NINETEENTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA:

The petition of the State of Louisiana on relation of its Attorney General, Fred S. LeBlanc, would, with respect, represent unto this Honorable Court as follows, to-wit:

I.

That defendants John G. Lewis, J. K. Haynes, T. J. Jemison, C. J. Gilliam and B. J. Stanley are residents of and domiciled in the Parish of East Baton Rouge, Louisiana.

II.

That defendant, Doretha A. Combre, is a resident of and domiciled in the Parish of Calcasieu, Louisiana.

III.

That defendant, R. B. Millspaugh, is a resident of and domiciled in the Parish of St. Landry, Louisiana.

IV.

That defendant, J. N. Stone, is a resident of and domiciled in the Parish of Caddo, Louisiana.

V.

That defendants, A. P. Tureaud, Sr., A. J. Chapital and Hasket Derby are residents of and domiciled in the Parish of Orleans, Louisiana.

VI.

That defendant, Clarence Laws, is a resident of and domiciled in the Parish of Orleans, Louisiana.

VII.

That the defendant, the National Association for the Advancement of Colored People (hereinafter referred to simply as the N.A.A.C.P.), is a non-profit, non-resident, membership corporation, organized under the laws of the State of New York.

VIII.

That the aforesaid N.A.A.C.P. is a "fraternal, patriotic, charitable, benevolent, literary, scientific, athletic, military, or social organization, or organization created for similar purposes", within the scope and meaning of R. S. 12:401, 402, 403, et sequentes.

IX.

That defendant, John G. Lewis, is a member of the Board of Directors of the said N.A.A.C.P. and a member of said corporation.

X.

That defendant, J. K. Haynes, is a member of the said N.A.A.C.P. and a member of an executive committee of said corporation in the State of Louisiana.

XI.

That defendant, T. J. Jemison, is a member of the said N.A.A.C.P. and a member of an executive committee of said corporation in the State of Louisiana.

XII.

That defendant, B. J. Stanley, is Treasurer of the State Conference of Branches of the N.A.A.C.P., former President of the Baton Rouge Branch of said corporation and a member of said corporation.

XIII.

That defendant, C. J. Gilliam, is President of the Baton Rouge Branch of the N.A.A.C.P. and a member of said corporation.

XIV.

That defendant, Doretha A. Combre, is President of the State Conference of Branches of the N.A.A.C.P. and a member of said corporation.

XV.

That defendant, R. B. Millspaugh, is a member of the said N.A.A.C.P. and a member of an executive committee of said corporation in the State of Louisiana.

XVI.

That defendant, J. N. Stone, is a member of the said N.A.A.C.P. and a member of an executive committee of said corporation in the State of Louisiana.

XVII.

That defendant, A. P. Tureaud, Sr., is a member of the said N.A.A.C.P. and a member of an executive committee of said corporation in the State of Louisiana.

XVIII.

That defendant, A. J. Chapital, is Vice-Presi-

dent of the State Conference of Branches of the N.A.A.C.P. and a member of said corporation.

XIX.

That defendant, Clarence Laws, is N.A.A.C.P. Field Secretary for the State of Louisiana and a member of said corporation.

XX.

That defendant, Hasket Derby, is a member of the said N.A.A.C.P. and a member of an executive committee of said corporation in the State of Louisiana.

XXI.

That each of the named defendants, with the exception of the N.A.A.C.P., is or has been a member of said N.A.A.C.P. in the State of Louisiana.

XXII.

That the said N.A.A.C.P. has, in the past, and particularly during the years 1953, 1954 and 1955, carried on an extensive business in the State of Louisiana which includes but is not limited to, organization of branches of the N.A.A.C.P., collection of membership dues, holding meetings, prosecution of legal actions, furnishing of counsel to litigants, and other similar activities.

XXIII.

That more especially, the said N.A.A.C.P. held a public mass meeting and parade in the Parish of East Baton Rouge on or about the 5th day of April, 1955.

XXIV.

That on or about the 13th day of February, 1955, the aforesaid N.A.A.C.P. held a meeting of the membership of the Baton Rouge Branch in the Parish of East Baton Rouge.

XXV.

That on or about the 7th day of May, 1955, the aforesaid N.A.A.C.P., acting through defendant Doretha A. Combre, together with others, forwarded and presented to Honorable Robert F. Kennon, Governor, the members of the State Legislature and the members of the Louisiana State Board of Education a petition requesting certain action on their parts, all in the Parish of East Baton Rouge.

XXVI.

That on or about the 22nd day of June, 1955, the Baton Rouge Branch of the said N.A.A.C.P., acting through one C. J. Gilliam, Chairman of the Administrative Committee, requested the East Baton Rouge Parish School Board to take certain actions, all in the Parish of East Baton Rouge, Louisiana.

XXVII.

That many additional meetings of the N.A.A.C.P. have been held in East Baton Rouge Parish and the local Baton Rouge Branch of said corporation maintains an office at 701 South 17th Street in the City of Baton Rouge.

XXVIII.

That these activities of said N.A.A.C.P. are so notorious and of such public and general knowledge that judicial notice thereof may be taken by this Honorable Court.

XXIX.

That many of the meetings herein described have been attended by some or all of the defendants herein named.

XXX.

That the named defendants, with the exception of defendant N.A.A.C.P., constitute most of the principal officers of the said N.A.A.C.P. in the State of Louisiana.

XXXI.

That the said N.A.A.C.P. has operated in the State of Louisiana under the guidance of and by virtue of the activities of the said defendants and others.

XXXII.

That the defendants have conspired together to hold meetings and/or do other things on behalf of and as a function of the said N.A.A.C.P., all in the Parish of East Baton Rouge and/or the State of Louisiana, at one or more times during the past years.

XXXIII.

That in spite of the clear and unambiguous provision of L.R.S. 12:401, 402, 403 et sequentes, none of the defendants have ever filed with the Secretary of State of the State of Louisiana a list of the members of the said N.A.A.C.P. who live or reside in the State of Louisiana.

XXXIV.

That none of the lists required by the said L.R.S. 12:401, 402 and 403 have ever been filed with the Secretary of State of Louisiana by any representative of the N.A.A.C.P. in spite of the fact that the N.A.A.C.P. has been operating in the Parish of East Baton Rouge and/or the State of Louisiana and holding meetings therein for several years.

XXXV.

That each of the meetings and activities of the said N.A.A.C.P. above described have been committed in violation of the sections of the Revised Statutes of the State of Louisiana hereinabove referred to. That consequently the con-

duct of these meetings and the failure of the defendants herein named to file the required lists of members with the Secretary of State constitute offenses against this State.

XXXVI.

That in order to protect the State of Louisiana from the commission of further offenses in this regard and under the provisions of L.R.S. 12:405, it is necessary that this Court permanently restrain and enjoin the defendants, their agents, employees and all other persons, firms or corporations acting or claiming to act on their behalf from holding any meetings of officers and/or members of the said N.A.A.C.P. in the State of Louisiana and further restraining the said N.A.A.C.P. from conducting any business or acting as a corporation in the State of Louisiana.

XXXVII.

That petitioner fears that defendants will continue their unlawful activity; therefore, in order to protect the State of Louisiana from the commission of further offenses in this regard during the pendency of these proceedings, it is necessary that this Court issue a preliminary writ of injunction in the form and substance of the permanent injunction mentioned above.

XXXVIII.

That since this is a proceeding brought by and on behalf of the State of Louisiana no bond need be furnished in connection with the issuance of any such injunction or restraining order.

XXXIX.

That under the provisions of L.R.S. 12:405, petitioner desires and is entitled to a decree dissolving defendant N.A.A.C.P. and each and every one of its branches or subdivisions in the State of Louisiana.

XL.

Petitioner annexes to this petition certain interrogatories on facts and articles which it desires the designated defendants to answer, under oath, categorically and in writing, in order to make use of their answers as testimony in support of plaintiff's demands.

XLI.

That defendant, the N.A.A.C.P., is not such a corporation as is required by law to appoint an agent for service of process but has engaged in business activities in this state through acts performed by its agents or employees; hence, under the provisions of L.R.S. 13:3471 service of process on said N.A.A.C.P. may be made on any employee or agent of said corporation over the age of eighteen (18) years.

WHEREFORE, petitioner prays (1) that the defendants each be served with a copy of this petition and be duly cited to appear and answer it; (2) that the defendants be ordered to respond, under oath, categorically and in writing, to the interrogatories accompanying this petition within a delay to be fixed by the Court; (3) that a rule nisi issue herein commanding them and each of them to show cause on a date, not less than two nor more than ten days from service hereof, why a preliminary injunction should not issue herein, without bond, restraining them and each of them, their agents, employees and all other persons, firms or corporations acting or claiming to act on behalf of any of them from holding any meeting of any officers and/or members of the said N.A.A.C.P. in the State of Louisiana and further enjoining the said N.A.A.C.P. from conducting any business or acting as a corporation all in the State of Louisiana; (4) that upon the trial of said rule there be judgment in favor of the State of Louisiana and your relator and petitioner, granting said preliminary injunction; (5) that upon final trial hereof judgment be rendered in favor of petitioner and against defendants, and each of them, perpetuating the said preliminary writ of injunction and making it permanent in the form and substance hereinabove mentioned; (6) that there be judgment herein in favor of your petitioner and against defendant, the N.A.A.C.P., dissolving the said N.A.A.C.P. in the State of Louisiana and each and every subdivision or subordinate body thereof.

Petitioner further prays for all necessary orders and decrees and for general and equitable relief.

/s/ FRED S. LEBLANC, ATTORNEY GENERAL OF THE STATE OF LOUISIANA
/s/ W. M. SHAW, SPECIAL ASSISTANT ATTORNEY GENERAL OF THE STATE OF LOUISIANA
/s/ SARGENT PITCHER, JR., OF COUNSEL

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared: W. M. Shaw who, after being first duly sworn, did depose and say:

That he is Special Assistant Attorney General

of the State of Louisiana and one of the counsel for plaintiff in the foregoing petition; that all of the facts and allegations therein contained are true and correct to the best of his knowledge, information and belief.

/s/ W. M. Shaw

SWORN TO AND SUBSCRIBED BEFORE ME, this 1st day of March, 1956.
/s/ Robert L. Kleinpeter
Notary Public.

CORPORATIONS
NAACP—Louisiana

John G. LEWIS et al. v. State of LOUISIANA ex rel. Fred S. LeBLANC, Attorney General. United States District Court, Eastern District, Louisiana, April 4, 1956, Civ. No. 1678.

SUMMARY: Prior to the decision by the Louisiana state court in this case, *supra*, p. 571, steps to effect a removal had been taken in the United States District Court for the Eastern District of Louisiana. Following further action in the state court, the defendants in that case, the National Association for the Advancement of Colored People and some of its officers and members in Louisiana, brought an action in that United States District Court for an injunction against further proceedings in the case in the state court. The Court observed that where the case is actually removed the state court is enjoined by operation of law[a] but refused to grant the injunction pending the completion of any review procedure in the state courts or federal appellate courts.

ON APPLICATION FOR INJUNCTION

The Court: [Wright, D. J.] This matter is before the court today on motion of defendants to enjoin further proceedings herein in the State Court. This court is of the opinion that if the case has been actually removed, there is already existing, by operation of law, under 28 U.S.C., 1446 (e), an injunction against the State, and against the State Court from further proceeding in the action, and, consequently, no further injunction at this time is necessary by this court.

Mr. Shaw: We agree with that.

The Court: Just a minute, please.

Further, the injunction which has been issued by the State Court against the defendants subsequent to the removal, should not be dissolved by this court. This court may enjoin further process and proceedings in the State Court, but it should not, in the circumstances here presented, dissolve what the State Court has already done, subsequent to the time the case was removed to this court. To do so would expose these defendants unwittingly to possible disciplinary action from the State Court. That court has already failed to recognize the removal of this matter to this court. There is no reason to believe it would be more apt to recognize the dissolution of its injunction by this court.

In the interest, therefore, of avoiding unseemly conflict with the State Court, this court is going to defer action on this motion for an injunction against further proceedings in the State Court in order to give the defendants in this case, that is, the defendants in the State Court action, John G. Lewis, et al, an opportunity to go before the proper State Courts in whatever appellate procedures are followed in the State Courts, including the United States Supreme Court, to seek the dissolution of the injunction issued by the State Court subsequent to removal, and, depending on what happens before those courts, this court will then be in a position to rule.

This is a highly unusual situation with which this court is presented. Ordinarily, as the law requires, when a case is removed to a Federal Court, the State Court complies with the law

a. Title 28, Section 1446 (e), United States Code, provides:
"Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded."

and proceeds no further. The Federal Court is then presented with nothing from the State Court that has been done after the removal has been effected. Here this court is presented with a situation where subsequent to the removal, the State Court has issued an injunction. Therefore, until that injunction is either dissolved or affirmatively upheld by the appropriate courts, this court is in no position to proceed in this particular case.

It will, therefore, defer action in this case until the matter of the propriety of the State Court issuing that injunction after removal of the case to this court is resolved by the appropriate appellate courts.

Mr. Shaw: May I ask you if there is anything that your Honor would like us to brief on anything of that type?

The Court: The court rules that it is deferring action until the matter is cleared up.

Court stands at recess.

April 8th, 1956
Wright, J:

MINUTE ENTRY:

This cause came on this day to be heard on application of plaintiff for injunction.

Present: A. P. Tureaud, Esq.,
Robert L. Carter, Esq.,
Alex Pitcher, Esq.,
Attorneys for Plaintiff
Fred S. LeBlanc, Esq.,
W. M. Shaw, Esq.,
Attorneys for Defendants

On motion of Fred S. LeBlanc–W. M. Shaw permitted to participate as counsel for defendants.

With reservation of certain jurisdictional objections on part of the defendants the matter was argued.

IT IS ORDERED BY THE COURT that

Action on application for injunction be and the same is hereby deferred until the matter of propriety of issuance by the State Court of injunction is determined in state court proceedings.

EDUCATION
Public Schools—Arkansas (Proposed)

An Initiative Petition prepared by a committee appointed by the governor is being circulated in Arkansas which proposes that there be placed on the ballot for submission to the voters a "School Pupil Assignment Law" which would authorize school officials to assign pupils to public schools on the basis of several factors. The petition setting out the proposed law follows:

INITIATIVE PETITION

To the Hon. C. C. HALL
Secretary of State of the State of Arkansas

We, the undersigned legal voters of the State of Arkansas, respectfully propose the following law, to wit:

(Popular Name)
SCHOOL PUPIL ASSIGNMENT LAW
(Ballot Title)

An Act to declare the public policy of the State of Arkansas with respect to assignment of pupils in public schools; to prescribe the method of making such assignments by the local school boards; and to provide for appeals from the decisions of local school boards in making such assignments.

Be It Enacted By The People of the State of Arkansas:

Section 1. It is expressly declared that nothing contained in this Act shall be construed as repealing, revoking or abridging any duties of any school district or school official under the existing laws of Arkansas; nor shall anything in this Act be construed as depriving any child of school age of the right to a free public school education as now provided by the Constitution and laws of Arkansas. Nothing in this Act shall be construed as repealing Act 169 of the Acts of 1931 commonly known as the "Compulsory School Laws."

Section 2. It is hereby expressly declared that it is the purpose of this Act to assure equal educational opportunities for all the children of Arkansas who are entitled to free public school education as provided by the Constitution and laws of Arkansas in a manner which is wholly consistent with and required by the inherent police power of the State of Arkansas to promote and protect the public health, peace, safety, happiness and morals of all the people of Arkansas.

Section 3. The board of directors of each school district is authorized and required to provide for the enrollment in a public school of each child who may apply for enrollment and who resides within the district or who is transferred thereto in the manner provided by law. Except as otherwise provided in this Act, the authority of each such board of directors in the matter of enrollment of pupils within its district shall be full and complete and its decision as to the enrollment of any pupil in any such school shall be final. No pupil shall be enrolled in, admitted to, or entitled or permitted to attend any public school in such districts other than the public school to which such pupil may be assigned pursuant to the rules, regulations and decisions of said board of directors. Each applicant for admission to a public school shall be assigned to such school as, in the judgment of the board of directors, will have a tendency to decrease or eliminate any feeling of inferiority on the part of the pupil as to his status in the community, to the end that there will be no detrimental effect upon the pupil by reason of his attendance at the school to which such pupil is assigned. Subject to review as provided in this Act, the board of directors may exercise the powers and duties granted by this Act directly or it may delegate its authority to other persons employed by the board under such rules and regulations as the board may adopt, and subject to final decision and action by the board itself.

Section 4. In determining the particular public school to which each pupil shall be assigned, the board of directors shall have the power, and it is hereby made its duty, to give consideration to and base its decision on the following fac-

tors: Available room and teaching capacity in the various schools; the geographical location of the place of residence of the pupil as related to the various schools of the district; the availability of transportation facilities; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for particular pupils; the adequacy of the pupil's academic preparation for admission to a particular school and curriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; the psychological qualification of the pupil for the type of teaching and associations involved; the effect of admission of the pupil upon the academic program of other students in a particular school or facility thereof; the effect of admission upon prevailing academic standards at a particular school; the psychological effect upon the pupil of attendance at a particular school; the possibility or threat of friction or disorder among pupils or others; the possibility of breaches of the peace or ill will or economic retaliation within the community; the home environment of the pupil; the maintenance or severance of established social and psychological relationships with other pupils and with teachers; the choice and interests of the pupil; the morals, conduct, health and personal standards of the pupil; the request or consent of parents or guardians and the reasons assigned therefor; together with any and all other factors, except the factor of race, which the board may consider pertinent, relevant or material in their effect upon the welfare and best interest of the applicant, other pupils of the district as a whole and the inhabitants of the district.

Section 5. Any person aggrieved by the final order of the board with reference to the assignment of a pupil as herein provided may, within ten (10) days from the date of said order, make written application to the board for a hearing before the board as to the reasonableness of the assignment. Upon receipt of such application for hearing, the board shall set a date for the hearing of the protest and such hearing shall be held within thirty (30) days after receipt of the written application for hearing. Written notice of the date and place of the hearing shall be given by the secretary of the board to the aggrieved party by mailing a notice of hearing to the aggrieved party at his last known mailing address at least ten (10) days before the date of hearing. Any person living within the district and having an interest in the result of the hearing may appear at the hearing, in person or by a representative, and present evidence for or against the reasonableness or legality of the assignment as made by the board. Within thirty (30) days after the completion of the hearing, the board shall enter a written order either granting or denying the protest. A copy of the order and finding of the board shall be mailed by the secretary of the board to all parties appearing at the hearing at their last known mailing address within five (5) days from the date of such order.

Section 6. (a) Any person aggrieved by the final order of the board of directors may, at any time within fifteen (15) days from the date of the final order, appeal therefrom to the circuit court of the county in which such administrative unit is domiciled. Such appeal may be taken by filing with the circuit clerk a true copy of all records, evidence and proceedings in the case duly certified by the secretary of the board; all of which shall become the record in the case in the circuit court. The circuit clerk shall docket the case and mail written notice of the appeal to the school board and to all parties appearing at the hearing before the board and the case shall stand for trial at any time after thirty (30) days from the date the notices aforesaid are mailed by the circuit clerk.

(b) No new or additional evidence shall be introduced in the court in which a review is sought, but every case shall be determined by the reviewing court upon the transcript of the record made at the hearing before the board of directors as certified by the secretary thereof. All evidence before the board of directors as shown by the transcript shall be considered by the court regardless of any technical rules which might have rendered the same inadmissible if originally offered in the trial of any action in a court of law.

(c) Upon hearing, the court may dismiss the petition for review or vacate the order complained of in whole or in part; but, in case the order of the board is wholly or partially vacated, the court may also, in its discretion, remand the case to the board of directors for further proceedings not inconsistent with the judgment of the court. The review in the circuit court as herein provided for shall not be extended further than to determine whether the board of di-

rectors has regularly pursued its authority, including a determination whether the order of the board under review violated any right of the aggrieved party under the Constitution of the United States or the Constitution of Arkansas. From the order of the circuit court, an appeal may be taken by any party, or the board of directors, aggrieved by the order of the circuit court to the Supreme Court in the same manner as other appeals are taken from final judgments of such court in civil actions.

Section 7. In case any part of this Act is held to be invalid, such holding shall not have the effect of invalidating the remaining provisions of the Act. This Act shall be liberally construed to protect and preserve the State police power as provided herein.

Section 8. All laws and parts of laws in conflict with this Act be, and the same are, hereby repealed.

EDUCATION

Public Schools—North Carolina

On April 5, 1956, the North Carolina Advisory Committee on Education, appointed pursuant to a resolution of the North Carolina Legislature, issued a report calling for certain statutory and constitutional changes to be made in the North Carolina laws, and making other recommendations with respect to meeting the problems created by the decisions in the *School Segregation Cases*. The committee's report follows:

The April 5th Report of the North Carolina Advisory Committee on Education to the Governor, the General Assembly, the State Board of Education, and the County and Local School Boards of North Carolina.

I. Authority of the Committee

This Committee was created by legislative resolution (Resolution No. 29, General Assembly of 1955) and has only the powers conferred by that resolution.

At the outset of this report we emphasize the fact that this Committee has no power to speak for any official in North Carolina. We have the power only to advise. No one need follow our advice. Our words have no significance except as they may have merit.

II. The Obligation of the Committee

It has been our duty to study the school situation in North Carolina. That we have done. It has been our duty to try to think clearly about matters in which emotions are involved to a high degree. That we have tried sincerely to do.

It is now our duty to speak plainly. That we shall try to do. We shall try to deal with facts as we find them—things as they are now, rather than as we might wish them to be or as they may be in the distant future. All our problems cannot be solved this year. But some things must be faced and some things must be done this year.

III. The Approach to Our Educational Problem

To deal with any problem it is first necessary to face it. Difficulties must be appraised honestly and frankly. Our first advice is that all of the people of North Carolina look the educational problem as affected by race straight in its face. We must appraise it for what it is, without wishful thinking or defiant anger. There is no simple, easy, or sure solution of the problem of the education of our children under the Supreme Court's shift of position.

We are in a very dangerous situation. It could become a dreadful situation quickly. The steady and healthy progress which we have been making for more than half a century in the betterment of our racial relations has been suddenly stopped. Now the tide is running the other

way. Racial tensions are mounting in North Carolina every day.

If this Committee can cause our people to realize just what they face, then half of our duty is done.

IV. The Problem Presented by The Supreme Court Decisions

At the very threshold of our tremendous problem there are some important conclusions which should be made clear. Two of these conclusions are of such paramount importance that we state them first:

1. We are of the unanimous opinion that the people of North Carolina will not support mixed schools. This is to say that we believe if the schools were integrated in this State, the General Assembly, representing the people, would withhold support to a degree that the result would certainly be the ruin and eventual abandonment of the public schools. Whether a particular viewpoint finds this conclusion to be good or bad, pleasant or unpleasant, it remains our conclusion and we state it as such.

2. The second threshold conclusion of which we are quite sure is that the saving of our public schools requires action now. To do nothing would, we believe, destroy our public schools. Those who would insure the preservation of the public schools are those who would act. The United States Supreme Court has dealt our schools a near fatal blow and it now requires positive action to save them.

There are other things which are important in the approach to our educational problem, things of which we can be sure.

3. In the past ninety years—1865-1955—the Negro race has made the most amazing progress which has ever been made in the history of man in any comparable period of time.

4. That progress has been helped, in fact has been made possible, by the cooperation and assistance of the white race.

5. The white race has been almost wholly responsible for the creation, development and support of an educational system which has been and is now educating the Negro children of the State, all of them. It was Aycock, Joyner and their followers who insisted in 1900 and thereafter that the Negro children of the State must be educated. And it was Aycock and his followers who insisted that there be no color line drawn between money expenditures for education, insisted that the Negro children be educated by the use of tax moneys paid largely by the whites.

6. The educational system of North Carolina has been built on the foundation stone of separation of the races in the schools. Our State Constitution required that. Every particle of progress which has been made in education since 1900 has rested squarely on the principle of separation of the races compelled by State law. Such building on the foundation of law-compelled segregation met the approval of the Federal Courts for more than fifty years. Our system is a segregated system in its origin and in its growth. When we speak today of our school system and of the development of that system under Aycock and his followers, we sometimes lose sight of the fact that the system of which we speak is *inherently a segregated system.* It could not have so developed, except as a segregated system. That should always be kept in mind. If we would "preserve our school system" we would have to preserve a segregated system.

7. The decisions of the Supreme Court of the United States have destroyed our foundation of segregation required by law. The Supreme Court has declared that the principle upon which our system was built and upon which it has rested, is no longer valid. So, we do not have the problem of "preserving our school system." The Supreme Court of the United States destroyed the school system which we had developed—a segregated-by-law system. Our problem is, rather, to build a new system out of the Supreme Court's wreckage of the old. This fact governs our whole approach to the problem. The task which faces us is how to use what we have left of our old educational system to provide an education for all of the children in North Carolina.

8. The decision of the Supreme Court of the United States, however much we dislike it, is the declared law and is binding upon us. We think that the decision was erroneous; that it was a reversal of established law upon an unprecedented base of psychology and sociology; that it could cause more harm within the United States than anything which has happened in

fifty years. But we must in honesty recognize that, because the Supreme Court is the court of last resort in this country, what it has said must stand until there is a correcting constitutional amendment or until the Court corrects its own error. We must live and act now under the decision of that Court. We should not delude ourselves about that.

Recent resolutions of protest are awakening the people of the whole country to a realization of the shocking invasion by the United States Supreme Court of the rights which have been reserved to the States, to Congress, and to the people as a foundation stone of our democratic republic. Our leaders are bringing to all of the people of the United States the consciousness that the very existence of our Democracy is threatened if the present trend toward autocratic central government control over the lives and over all of the affairs of the people of the several States is not reversed. *In fact, we recommend the adoption by our General Assembly of a strong resolution of protest along these lines.* But resolutions do not entirely meet our need right now. This year the decisions of the Supreme Court are with us, and if we are to continue the operation of our public schools we should take further action now.

9. There is little chance that a constitutional amendment will be adopted which will change the Supreme-Court-made law in the near future. A constitutional change must await a turn in the thinking of the majority of the voters in the United States. That change must await time for the people all over the United States to realize that the children of the two races fare better in separate schools and that it is best to leave the delicate subject of adjustment of racial relations to the people of the communities in which the racial contacts occur. That, again, is a matter of years. It may or may not occur. What we can be sure of is that there will not be an amendment of the Federal Constitution this year. Therefore, we must plan this year under the law as it is now.

10. Defiance of the Supreme Court would be foolhardy. Defiance would alienate those who may be won to our thinking, that separateness of the races is natural and best. Defiance would forfeit the consideration we must have from the Federal Judges if we are to educate our children now. Defiance of the Supreme Court of the United States and of the law as declared by that Court could mean the closing of the public schools very quickly. We cannot make a single plan about what we are going to do in our schools this year without giving paramount consideration to our relationship to the Federal Courts.

11. The Negro leaders from outside the State, and those who are now vocal within the State, appear to be totally indifferent to the fact that their belligerence, their attempt to use the threat of Federal punishment to achieve complete integration, will prevent Negro children from getting a public school education in North Carolina. They appear to be much more interested in assailing the whites with what they conceive to be a mandate of the Federal Supreme Court than in the education of their children. That attitude merely increases the educational burden which the white man has borne for more than half a century, namely, the burden of educating the Negro children as well as the white children. If the Negro children in North Carolina are to continue receiving public education, it will be as the result of the work and effort of the people of the white race. But that burden must be borne and must include a willingness to provide, at whatever cost, fully adequate schools and facilities for the Negro children of our State. North Carolina is already committed to an aggressive program of urging and encouraging this provision of adequate facilities. That commitment must be performed. But the bearing of that burden is not entirely unselfish. If the State of North Carolina is to go forward, if the white race in North Carolina is to go forward, the Negro must go forward also. The advancement of our economy and the preservation of our democracy depend in large part upon the education, the understanding, and the morality of the Negro as well as the white. If there prevails ignorance in either race, servitude in either race, hatred in either race, our economy will stall, our society will seethe, and our democracy will degenerate.

V. Our Schools Can be Rebuilt

We have pointed out that the Supreme Court has destroyed the school system which has existed in North Carolina—that is, a segregated-by-law system. Now, we must rebuild our school system. There are only two forces which can prevent this. The white people of North Carolina can prevent rebuilding of our schools if they are not courageous and wise and self-restrained. The Federal Courts can prevent the rebuilding of our schools if they are not tolerant and patient and conscious of the practicalities of the present situation.

As we face the task of rebuilding, we are encouraged by the following facts:

1. No Federal Court has said that there must be mixing of the races—integration. No Federal Court has said that any child of any race must be compelled to go to school with a child or children of another race. This is of great importance. The precise Federal Court decision was that a law is invalid if it says that a child can be excluded from a school solely because of race. But no Court has said that a child must go to a school with children of another race.

2. The Supreme Court in May 1954 said that children have the right not to be barred from any public school by law because of color. In May 1955 that same Court indicated recognition of the gravity of the problem and the necessity of giving effect to local conditions in school admissions. To us the Supreme Court has said just this, a law barring a child from a public school because of color and nothing else is invalid; but an administrative body may well find, if it acts honestly and in the light of local conditions, that under existing local conditions it may not be feasible or best for a particular child to go to a particular school with children of another race. *A color bar by law is one thing. A factual local condition bar, even if color is one of the causes of the condition, is a different thing.* An understanding and tolerant Court may well recognize that difference.

3. The United States Court of Appeals for the Fourth Circuit in a recent North Carolina case from McDowell County said that a child could not press his complaint in the Federal Courts for not being admitted to any particular school until after he had applied for admission to that school, had been denied, and had then exhausted his remedies in the State Courts, provided by the Assignment Statute enacted by the 1955 General Assembly. This decision recognized that each admission case must depend upon the individual facts of that case and that those facts should be completely adjudicated in the State Courts as required by State Statute.

4. We believe that members of each race prefer to associate with other members of their race *and that they will do so naturally unless they are prodded and inflamed and controlled by outside pressure.*

We think it is also true that children do best when in school with children of their own race. We think that in the course of time that will be plain to everyone. When the fires have subsided, when sanity returns, when the NAACP finds that it cannot use the Federal Courts as a club in a fight with the white people, and when the North Carolina Negro finds that his outside advisors are not his best or most reliable friends, then we can achieve the voluntary separation which our Governor and other State leaders have so wisely advocated.

Until that time arrives we urge that members of both races act and speak with restraint and avoid an open break between the races which would make it impossible to approach the solution of our problem in a spirit of reason and cooperation. An attitude of tolerance and cooperation is responsible for the harmonious relations which the races have enjoyed in North Carolina for more than fifty years and accounts for the great progress which the Negro race has made in our State during that time. Given time, we hope that same attitude can be re-established and will aid greatly in the solution of this, our greatest problem.

VI. What the Committee Advises for This Summer and Fall

At this time the people of North Carolina must think about what should be done this Summer and this Fall to meet the problems presented then. The first thing which we advise for each local school unit is to operate the assignment machinery provided by the 1955 Statute. We advise that each local school unit recognize honestly and in good faith that although there is no legal barrier to the admission of Negro children and white children

to the same school, nevertheless, the children of one race should do better in a public school with children of the same race. *There should also be recognized the fact that there is no legal compulsion on any one to mix the races.*

Specifically, we recommend that all school units:

1. Recognize that there is no law compelling the mixing of the races.

2. Recognize that since the Supreme Court decision there can be no valid law compelling the separation of the races in public schools.

3. Declare that initial assignments to schools will be made in accordance with what the assigning unit (or officer) considers to be for the best interest of the child assigned, including in its consideration, residence, school attended during the preceding year, availability of facilities, and all other local conditions bearing upon the welfare of the child and the prospective effectiveness of his school.

4. After initial assignments are made, permit transfers only upon application and hearing in due course and in accordance with the provisions of the 1955 assignment law.

VII. Insuring a Safety Valve

We think that what we are proposing is constructive; that it is affirmative. But it should be noted again that we are proposing the building of a new school system on a new foundation—a foundation of no racial segregation by law, but assignment according to natural racial preference and the administrative determination of what is best for the child. We know that this new program will present many problems, many difficulties and some controversies, but we think that it can be made to succeed to the satisfaction of the people of the State.

The original Governor's Special Advisory Committee, composed of eighteen North Carolinians in its report of December 1954 said: "The schools of our State are so intimately related to the customs and feelings of the people of each community that their effective operation is impossible except in conformity with community attitudes." The Committee said that unanimously. The three Negro members of the Committee said just that. They signed the report. The Legislature of North Carolina unanimously adopted a resolution which was even stronger in its terms.

It may well be that before the people of North Carolina will give the necessary support to an honest trial of the assignment plan they will need to be assured of escape possibilities from intolerable situations—assured first that no child will be forced to attend a school with the children of another race in order to get an education and assured, second, that if a public school situation becomes intolerable to a community, the school or schools in that community may be closed. To achieve those objectives there must be some changes in the North Carolina Constitution and some legislative enactments based thereon.

We recommend that a special session of the General Assembly of North Carolina be called this summer to consider submitting to the people the question of changes in our State Constitution.

We recommend that this Legislature cause to be submitted to a vote of the people of North Carolina constitutional amendments, or a single amendment to achieve these desirable and, we think, necessary results:

1. Authority for the General Assembly to provide from public funds financial grants to be paid toward the education of any child assigned against the wishes of his parents to a school in which the races are mixed—such grants to be available for education only in non-sectarian schools and only when such child cannot be conveniently assigned to a non-mixed public school.

2. Authority for any local unit created pursuant to law and under conditions to be prescribed by the General Assembly, to suspend by majority vote the operation of the public schools in that unit, notwithstanding present constitutional provisions for public schools.

These proposed constitutional changes are recommended for consideration with the thought that such changes will give to the people of North Carolina the confidence and assurance which are necessary in order to aid the rebuilding of our school system. We do not think that these changes pose a threat to public education generally in the State. On the contrary, we believe that they will provide the necessary means to assure the support of the white people

so badly needed to continue our public schools. If the white people support a public school system in North Carolina, public education will continue. If the white people do not support a public school system in North Carolina, there will be no public education. To gain that support we believe it will be necessary to provide an available escape from a possibly unacceptable situation.

VIII. Conclusion

In conclusion we express the hope that our report has not been so gloomy as to cause the discouragement of our people. We have thought it necessary to speak plainly and to face the facts realistically. But we are not discouraged about the prospects. We think that the future is difficult but that a satisfactory solution will be achieved and that our State will go forward. It is true that we face dark days. But we have faced dark days in the past and have emerged from our difficulties.

As never before in this century we need courage, coolness, tolerance, and good will by the members of all races. We need the very best leadership which our generation can provide, unselfish, farseeing, statesmanlike leadership. Above all, we need the opportunity to solve our monumental problem with the minimum of outside, uninformed interference, pressures and compulsion.

We do not in any sense consider the filing of this report as terminating the work of our Committee. We are fully aware that what is recommended now may not be sufficient to meet all the conditions which may develop in this fast-moving and ever-changing problem. We intend to continue our constant observation and study of all developments and will, as it becomes necessary, make further recommendations to deal with it.

In the meantime, we have confidence in the ultimate awakening of the people of the United States to the dangers inherent in constitutional amendments by judicial fiat and in the attempted unnatural adjustment of racial relations by force.

We have confidence in the strength, the soundness and good will of the people of North Carolina.

We think what we have proposed, if adopted, will preserve public schools and help preserve the public peace for what we hope will be a long time, but we stand ready to do more whenever it becomes necessary.

Respectfully submitted this the 5th day of April, 1956.

Thomas J. Pearsall, *Chairman*
William T. Joyner, *Vice-Chairman*
Lunsford Crew
R. O. Huffman
William Medford
H. Cloyd Philpott
Edward F. Yarborough

EDUCATION
Public Schools—South Carolina

Act No. 662 of the Acts and Joint Resolutions of the 1956 regular session of the General Assembly of South Carolina provides for appeals procedure for the review of decisions of any board of trustees of a school district with respect to, inter alia, the placement of pupils. That act follows:

An Act To Amend Section 21-103 Of The Code Of Laws Of South Carolina, 1952, Relating To The Determination Of Local Controversies And Appeals From County Boards Of Education, So As To Provide For Appeals From Decisions Of Boards Of Trustees To County Boards Of Education And Appeals From County Boards Of Education To The Courts, And To Amend Section 21-46 Of The Code Of Laws Of South Carolina, 1952, Relating To The Powers And Duties Of The State Board Of Education So As To Eliminate Therefrom All Reference To Appeals From County Boards Of Education.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 21-103 of the Code of Laws of South Carolina, 1952, is hereby amended

by striking the entire Section and substituting in lieu thereof the following:

"Section 21-103 (1). Subject to the provisions of Section 21-230, as amended, any parent or person standing in loco parentis to any child of school age, the representative of any school or any person aggrieved by any decision of the Board of Trustees of any school district in any matter of local controversy in reference to the construction or administration of the school laws or the placement of any pupil in any school within the district, shall have the right to appeal the matter in controversy to the County Board of Education by serving a written petition upon the Chairman of the Board of Trustees, the Chairman of the County Board of Education and upon the adverse party within ten (10) days from the date upon which a copy of the order or directive of the Board of Trustees was delivered to him by mail or otherwise. The petition shall be verified and shall include a statement of the facts and issues involved in the matter in controversy. The parties shall be entitled to a prompt and fair hearing by the board which shall try the matter *de novo* and in accordance with its rules and regulations. Where individual children of school age are involved in the matter in controversy, the case of each child shall be heard and disposed of separately.

"Section 21-103 (2). After the parties have been heard, the County Board of Education shall issue a written order disposing of the matter in controversy, a copy of which shall be mailed to each of the parties at interest and any party aggrieved thereby shall have the right to appeal to the Court of Common Pleas of the county by serving a written verified petition upon the Chairman of the County Board of Education and upon the adverse party within ten (10) days from the date upon which copy of the order of the County Board of Education was mailed to the petitioner. The parties so served shall have twenty (20) days from the date of service, exclusive of the date of service, within which to make return to the petition or to otherwise plead, and the matter in controversy shall be tried by the circuit judge, *de novo*, with or without reference to a master or special referee; *provided*, that the County Board of Education shall certify to the court the record of the proceedings upon which its order was based, and the record so certified shall be admitted as evidence and considered by the court, along with such additional evidence as the parties may desire to present. The courts shall consider and dispose of the cause as other equity cases are tried and disposed of, and all parties at interest shall have such rights and remedies, including the right of appeal, as are now provided by law in such cases.

"Section 21-103 (3). In counties where the functions of the Boards of Trustees and those of the County Board of Education have been combined, the appeal provided in Section 21-103 (1) shall lie to the County Board of Education from its original action disposing of the matter in controversy before hearing.

"Section 21-103 (4). At any hearing provided for in Section 21-103 (1), the parties may appear in person or through an attorney licensed to practice in South Carolina and may submit such testimony, under oath, or other evidence as may be pertinent to the matter in controversy.

"Section 21-103 (5). The County Board of Education may designate one of its members to conduct any hearing provided for in Section 21-103 (1) and report the matter to the board for determination.

"Section 21-103 (6). Until the matter in controversy has been finally disposed of, no appeal shall act as a supersedeas or suspension of the order of the board having original jurisdiction of the cause."

SECTION 2. Amend Section 21-46 of the Code of Laws of South Carolina, 1952, by striking therefrom the last two sentences so that said Section shall, when amended, provide as follows:

"The State Board of Education shall constitute an advisory body with whom the State Superintendent of Education shall have the right to consult when he is in doubt as to his official duty."

SECTION 3. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

SECTION 4. All Acts or parts of Acts inconsistent herewith are hereby repealed.

SECTION 5. This Act shall take effect upon its approval by the Governor.

Approved the 8th day of March, 1956.

EDUCATION
Public Schools—South Carolina

Act No. 676 of the Acts and Joint Resolutions of the 1956 regular session of the General Assembly of South Carolina vests certain hearing and rule-making powers in school boards of trustees. That act follows:

An Act To Add Section 21-230.2 To The Code Of Laws Of South Carolina, 1952, Relating To The General Powers And Duties Of School Trustees, So As To Vest School Boards Of Trustees With Rule-Making Power.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 21-230.2 is hereby added to the Code of Laws of South Carolina, 1952, and shall read as follows:

"Section 21-230.2. The boards of trustees of the several school districts may prescribe such rules and regulations not inconsistent with the statute law of this State as they may deem necessary or advisable to the proper disposition of matters brought before them. This rule-making power shall specifically include the right, at the discretion of the board, to designate one or more of its members to conduct any hearing in connection with any responsibility of the board and to make a report on this hearing to the board for its determination."

SECTION 2. All acts or parts of acts inconsistent herewith are hereby repealed.

SECTION 3. This act shall take effect upon its approval by the Governor.

Approved the 9th day of March, 1956.

EDUCATION
Public Schools—South Carolina

Act No. 677 of the Acts and Joint Resolutions of the 1956 regular session of the General Assembly of South Carolina vests certain hearing and rule-making powers in county boards of education. That act follows:

An Act To Add A New Section To The Code Of Laws Of South Carolina, 1952, Designated As Section 21-106, So As To Provide That County Boards Of Education Shall Have Rule-Making Power.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 21-106 is hereby added to the Code of Laws of South Carolina, 1952, and shall read as follows:

"Section 21-106. County boards of education may prescribe such rules and regulations not inconsistent with the statute law of this State as they may deem necessary or advisable to the proper disposition of matters brought before them. This rule-making power shall specifically include the right, at the discretion of the board, to designate one or more of its members to conduct any hearing in connection with any responsibility of the board and to make a report on this hearing to the board for its determination."

SECTION 2. All acts or parts of acts inconsistent herewith are hereby repealed.

SECTION 3. This act shall take effect upon its approval by the Governor.

Approved the 9th day of March, 1956.

EDUCATION
Athletic Events—Virginia

House Joint Resolution No. 97 of the Virginia House of Delegates, introduced on March 2, 1956, and adopted by both houses of that body, provides for racial segregation at athletic events in which "any school" in Virginia shall participate. The resolution follows:

HOUSE JOINT RESOLUTION NO. 97

Declaring the public policy of Virginia as to the participation in certain athletic events of athletic teams of the public schools.

Offered March 2, 1956

Whereas, the long established policy of this Commonwealth has been to provide for the separation of the races which has resulted in many benefits to both races; and

Whereas, this wise policy should be preserved by all legal means at our command to the end that the benefits of this policy may be perpetuated; now, therefore, be it

Resolved by the House of Delegates, the Senate concurring, that it is the public policy of Virginia that no athletic team of any school should engage in any athletic contest of any nature within the State of Virginia with another team on which persons of any other race are members, nor should any such school schedule or permit any member of its student body to engage in any athletic contest within the State of Virginia with a person of another race while such student is a member of such student body.

GOVERNMENTAL FACILITIES
Golf Course—Alabama

On February 23, 1956, the city council of the City of Huntsville, Alabama, adopted a resolution providing for segregated use of the municipal golf course. The resolution follows:

"Upon motion of Alderman Walker, seconded by Alderman Copeland, it was unanimously voted to sell season golf tickets to white persons at $60.00 each.

Upon motion of Alderman Walker, seconded by Alderman Loftin, it was unanimously voted to set aside each Monday as the day on which negroes could play on the Municipal Golf Course and that season tickets be sold to them, for this one day per week only, for $10.00 each."

GOVERNMENTAL FACILITIES
Swimming Pools—Texas

On March 22, 1956, the city council of San Antonio, Texas, enacted an ordinance abolishing previously required racial segregation in the use of municipal swimming pools and other recreational facilities. The ordinance follows:

AN ORDINANCE
[No. 22555]
REPEALING ORDINANCE NO. 20,307, PASSED AND APPROVED JUNE 19, 1954, AND PROVIDING FOR THE NON-SEGREGATED USE AND ENJOYMENT OF ALL MUNICIPAL FACILITIES.

* * *

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

1. Ordinance No. 20,307, requiring the segregation of the Negro and white races in municipally-operated swimming pools, is hereby repealed.

2. All municipally-owned facilities shall be open to all persons on an equal basis, regardless of race, color, or creed.

3. Whenever a municipally-owned facility is leased or rented by any person, group, associa-

tion, organization or corporation for the purpose of holding a public function, all persons shall be admitted on an equal basis regardless of race, color, or creed. For the purposes of this ordinance, "public function" shall mean any function or activity to which admittance may be obtained by purchase of tickets offered for sale to the public generally, or by payment of an admission price charged to the public generally.

4. PASSED AND APPROVED this 22nd day of March, A.D., 1956.

GOVERNMENTAL FACILITIES
Closing—South Carolina

Act No. 917 of the Acts and Joint Resolutions of the 1956 regular session of the General Assembly of South Carolina provides for the closing of Edisto Beach State Park. (See *Clark v. Flory*, p. 528). That act follows:

An Act To Provide For The Closing Of Edisto Beach State Park And Placing It Under A Caretaker.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Since Edisto Beach State Park is now involved in litigation in the Federal Courts, the South Carolina State Forestry Commission is hereby authorized and directed forthwith to close the State Park at Edisto Beach and place it under a caretaker for safe-keeping until further action is taken by the Legislature for the disposition of the properties of the State at Edisto Beach State Park.

SECTION 2. All acts or parts of acts inconsistent herewith are hereby repealed.

SECTION 3. This act shall take effect upon its approval by the Governor.

Approved the 8th day of February, 1956.

PUBLIC ACCOMMODATIONS
General—District of Columbia

Following the decision of the Municipal Court of Appeals of the District of Columbia in the case of *Central Amusement Company, Inc. v. District of Columbia, supra*, p. 554, the Board of Commissioners of the District of Columbia adopted an order to make it clear that the non-discrimination ordinance involved in that case was applicable throughout the District of Columbia. The order (No. 56-874, May 3, 1956) follows:

REGULATIONS

Concerning admission to, and accommodation in, licensed places of public amusement in the District of Columbia.

COMMISSIONERS OF THE DISTRICT OF COLUMBIA

WHEREAS:

The Act of the Corporation of the City of Washington approved June 10, 1869, entitled "An Act regulating admission to places of public amusement and entertainment" provides as follows:

"*Be it enacted by the Board of Aldermen and Board of Common Council of the City of Washington*, That from and after the passage of this act it shall not be lawful for any person or persons who shall have obtained a license from this Corporation for the purpose of giving a lecture, concert, exhibition, circus performance, theatrical entertainment, or for conducting a place of public amusement of any kind, to make any distinction on account of race or color, as regards the admission of persons to any part of the hall or audience-room where such lecture, concert, exhibition, or other entertainment may be given: *Provided*, That any person applying shall pay the regular price charged for admission to such part of the house as he or she may wish to

occupy, and shall conduct himself or herself in an orderly and peaceable manner, while on the premises; and any person or persons offending herein shall forfeit and pay to this Corporation for each offense a fine of not less than ten nor more than twenty dollars to be collected and applied as are other fines.

"Sec. 2. *And be it further enacted,* That all acts or parts of acts inconsistent with this act be, and the same are hereby, repealed.",

and the aforesaid Act was amended by the Act of said City approved March 7, 1870 which increased the penalty for each violation thereof to a fine of not less than fifty dollars; and

WHEREAS:

The provisions of said Act as amended have been sustained and held to be applicable within the limits of the City of Washington, including that part of the District of Columbia known as Georgetown, by the Municipal Court of Appeals for the District of Columbia in the case of *Central Amusement Company, Inc.* v. *District of Columbia,*_____Atl. (2d)_____ (No. 1753, April 3, 1956);

NOW THEREFORE, in order to make the requirements of said Act as uniform as possible within all of the District of Columbia, it is hereby

ORDERED:

That the provisions of the aforesaid Act as amended are hereby adopted and incorporated herein by reference and made applicable to the area of the District of Columbia outside the limits of the City of Washington, and that any violation of such provisions within the District of Columbia outside the limits of the City of Washington shall be punished by a fine of not less than fifty dollars nor more than three hundred dollars.

This regulation to be effective on and after June 7, 1956.

By order of the Board of Commissioners, D. C.

CONSTITUTIONAL LAW

Interposition and Nullification—Arkansas (Proposed)

An Initiative Petition approved by a committee appointed by the governor is being circulated in Arkansas which proposes that there be placed on the ballot for submission to the voters a "Resolution of Interposition" relative to the operation of public schools. The petition setting out the proposed resolution follows:

INITIATIVE PETITION

To the Hon. C. G. HALL
Secretary of State of the State of Arkansas:

We, the undersigned legal voters of the State of Arkansas, respectfully propose the following law, to wit:

(Popular Name)
ARKANSAS RESOLUTION OF INTERPOSITION
(Ballot Title)

A Resolution and Act by the People of Arkansas calling for an amendment to the Constitution of the United States prohibiting the Federal Government from exercising power over the operation of public schools in Arkansas; pledging the People to take all appropriate measures to resist illegal encroachments on the power of the state to control its domestic institutions; and calling on People of other states to assist in prohibiting further encroachments by the Federal Government upon the powers reserved to the states.

Be It Resolved and Enacted by the People of the State of Arkansas:

The People of the State of Arkansas express their firm resolution to maintain and defend the Constitution of the United States and the Constitution of the State of Arkansas against every attempt, whether foreign or domestic, to weaken or destroy the structure of the State and federal governments.

The People of Arkansas will ever defend and maintain the fundamental principle of our basic laws by which certain powers were delegated by the people of the separate states to the governments of the separate states while other specifically enumerated powers, not delegated to the separate states or reserved to the people, were delegated to the federal government. The

State has never delegated to the Supreme Court of the United States the power to change the Constitution of the United States.

The People of Arkansas assert that the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political faith depends.

The People of Arkansas assert that the power to operate public schools in the State on a racially separate but substantially equal basis was granted by the People of Arkansas to the government of the State of Arkansas; and that, by ratification of the Fourteenth Amendment, neither the State of Arkansas nor its people delegated to the federal government, expressly or by implication, the power to regulate or control the operation of the domestic institutions of Arkansas; any and all decisions of the federal courts or any other department of the federal government to the contrary notwithstanding.

Therefore, The People of Arkansas, By Popular Vote:

1. Respectfully appeal to all the people of the United States and to the governments of all the separate states and request them to join the people of Arkansas in taking steps, pursuant to Article V of the Constitution of the United States, by which the Constitution of the United States shall be amended so as to contain a provision substantially as follows:

> "The legislative, executive and judicial powers of the United States as granted under the Constitution shall not be construed to extend to the regulation of the public schools of any State nor to include a prohibition to any State, in the exercise of its power, to provide by its laws for the establishment, operation and maintenance of racially separate but substantially equal public schools within such State."

2. Pledge our firm intention to take all appropriate measures, honorably and legally available to us, to resist any and all illegal encroachments upon the powers reserved to the State of Arkansas to order and control its own domestic institutions according to its own exclusive judgment.

3. Urge upon the separate States and the people thereof their prompt and deliberate efforts to prohibit any further encroachments by the federal government upon the powers reserved to the separate states and the people thereof.

CONSTITUTIONAL LAW
State Sovereignty Commission—Mississippi

House Bill No. 880 of the 1956 regular session of the Mississippi Legislature, as approved by the governor, provides for the creation of a "State Sovereignty Commission" to take action "to protect the sovereignty of the State of Mississippi, and her sister states, from encroachment thereon by the federal government or any branch, department or agency thereof; and to resist the usurpation of the rights and powers reserved to" the State of Mississippi. House Bill No. 891, approved by the governor, appropriates $250,000 for use by the commission.

HOUSE BILL NO. 880
(Approved by Governor)

AN ACT CREATING THE STATE SOVEREIGNTY COMMISSION, PRESCRIBING THE MEMBERSHIP THEREOF, THE METHODS BY WHICH THEY ARE TO BE SELECTED AND THEIR TERMS OF SERVICE, DESCRIBING ITS AUTHORITY, DUTIES AND POWERS; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. There is hereby created the State Sovereignty Commission, which shall be composed of the following members: The Governor, the Attorney General, the President of the Senate, and Speaker of the House of Representatives, who shall be ex officio members; three (3) citizens who shall be appointed by the Gov-

ernor, one from each Supreme Court District; two (2) members of the State Senate who shall be appointed by the President of the Senate, and three (3) members from the House of Representatives who shall be appointed by the Speaker of the House of Representatives. The Governor, Attorney General, President of the Senate and Speaker of the House of Representatives shall serve from and after the date of passage of this act during the remainder of their terms of office, as such ex officio members; the members of the State Senate and the House of Representatives shall serve from and after the date of their appointment until the expiration of their present terms of office, and the three (3) members appointed by the Governor shall serve during his term of office and their successors shall be appointed in a like manner and serve for a like period. The membership of the State Sovereignty Commission shall be successively composed from term to term in the manner set forth above, and the membership and their successors are clothed with the full power and authority conferred upon them by this act, together with any and all other powers necessary to accomplish the purposes of this act.

SECTION 2. Each member of the commission, other than the Governor and the Attorney General, shall receive a per diem of twenty dollars ($20.00) for each day of service rendered in attending meetings or otherwise in the discharge of his duties hereunder, and payment of hotel, meals, and traveling expenses while away from his home for any of the purposes herein. If the member should use his own automobile in travel or business of the commission, he shall be paid six cents (6¢) per mile for each mile traveled.

All expenditures by or for the commission, out of funds appropriated by the state, shall be paid by the state treasurer upon warrants issued by the auditor of public accounts, which warrants shall be issued upon requisition signed by the chairman of this commission. All funds received from other sources shall be kept and accounted for and expended in such manner as may be determined by the commission. Full and complete accounting shall be kept and made by the commission for all funds received and expended by it. Representatives of the office of the State Auditor of Public Accounts shall annually audit the expenditures of all funds received by the commission from all sources; and the said auditor of public accounts shall make a complete and detailed report of such audits to the legislature.

SECTION 3. The Governor shall be chairman of the commission, and the President of the Senate the vice-chairman, with authority to act in the absence of the chairman. The commission may employ a secretary who shall keep a record of the proceedings of the commission and its receipts and disbursements.

SECTION 4. Vacancies occurring during any term shall be filled by the successor in office to the Governor, Attorney General, President of the Senate or Speaker of the House of Representatives, each respectively, and other vacancies shall be filled by appointment by the Governor, President of the Senate and Speaker, each respectively, as the case may be.

SECTION 5. It shall be the duty of the commission to do and perform any and all acts and things deemed necessary and proper to protect the sovereignty of the State of Mississippi, and her sister states, from encroachment thereon by the Federal Government or any branch, department or agency thereof, and to resist the usurpation of the rights and powers reserved to this state and our sister states by the Federal Government or any branch, department or agency thereof.

SECTION 6. The commission may co-operate with one or more of the states of the Union, or any agency or agencies, commission or commissions thereof, or with any person or persons, corporation or corporations, organization or organizations, and may join with them or any of them, and pool such of the funds and resources of this commission in carrying out the objectives and purposes of this act as may be deemed necessary and proper by the commission.

SECTION 7. It shall be the duty of such commission to keep full and complete minutes and records of all its proceedings and actions, which said minutes and records shall be open to the inspection of any member of the legislature at any reasonable time during the regular hours of a business day.

SECTION 8. The said commission is hereby fully authorized and empowered to subpoena and examine witnesses, to require the appearance of any persons and the production of any

books, records, papers or documents as evidence, and to order the attendance of any witness or the production of any books, records, papers and documents and, in such cases, the commission shall have the power to issue all necessary process which shall be signed by the chairman, vice-chairman, or secretary of said commission, and shall be directed to the sheriff of any county or to the bailiff or process server of said commission, or the deputy of either. When any such process has been served, obedience thereto may be enforced by the attachment of the persons, papers and records subpoenaed, and if any person should willfully refuse to appear before such commission or to produce any paper or record in obedience to any process issued and served, then the commission shall have authority to enforce obedience thereto by fine or imprisonment in the discretion of the commission.

SECTION 9. The chairman, vice-chairman, or secretary of the commission is hereby authorized and empowered to administer oaths to witnesses, and any witness appearing and testifying before said commission who shall willfully and corruptly testify falsely to any material fact shall be guilty of perjury and shall be subject to prosecution and punishment therefor as provided by law; and if such perjury be manifest, or if the witness shall refuse to testify or produce any books, records, papers or documents, he shall be guilty of contempt of the commission and shall be punished accordingly.

SECTION 10. The commission shall have the power and authority to apply to the chancery court of the first judicial district of Hinds County for aid and for the issuance of the proper process to enforce obedience to any process issued by said commission.

SECTION 11. Any person sworn and examined as a witness before said commission without procurement or contrivance on his part shall not be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify, nor shall any statement made or book, paper or document produced by any such witness be competent evidence in any criminal proceeding against such witness other than for perjury in delivering his evidence. Should any witness refuse to testify to any fact or refuse to produce any book, document or paper touching which he is to be examined, on the ground that he will thereby incriminate himself, or that it will tend to discredit or render him infamous, the commission shall consider such refusal as a part of the evidence and shall inform the public of the refusal of such witness to so testify, and the facts and circumstances under which such refusal was made.

SECTION 12. The members of the commission and the duly authorized employees and representatives of the commission shall have the power and authority to examine, during the usual business hours of the day, all records, books, documents and other papers touching upon or concerning the matters and things about which the commission is authorized to conduct an investigation, and the commission shall have the power and authority to require all persons, firms and corporations having such books, records, documents and other papers in their possession or under their control to produce same within this state at such time and place as the commission may designate, and to permit an inspection and examination thereof by the members of said commission or its authorized representatives and employees. The authority of the commission and its employees to examine such books, records, and papers shall extend to all such books, records, and papers which are required by law to be kept or which are necessary or helpful in conducting investigations. If any person, firm or corporation shall willfully fail or refuse to comply with the provisions of this section, then such person, firm or corporation shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00), or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

SECTION 13. The commission may employ such legal, professional, expert, secretarial, clerical and other help deemed necessary and proper to carry out the objectives and purposes of this act, and is hereby authorized and empowered to fix the compensation of such employees at any reasonable amount, in its discretion, and in addition, to reimburse such employees for expenses incurred in traveling on the business of the commission. The commission may also pay witness fees and mileage to witnesses at the rates now

allowed witnesses by law in the circuit court. A full, complete and itemized record shall be kept of all such expenditures. The commission may expend such of its funds deemed necessary for advertisement in any manner or form deemed necessary, and to employ speakers and other persons and agencies wherever deemed necessary and proper to assist this commission in carrying out the objectives and purposes hereof.

SECTION 14. The commission is authorized and empowered to receive and expend any funds appropriated to it by the legislature of this state, and/or received by it from any other sources, in carrying out the objectives and purposes of this act.

SECTION 15. The commission is hereby authorized and empowered to receive contributions, donations and gifts of money and/or property from any state, department, agency, commission, or subdivision thereof, and from any person, corporation, or organization, to be expended by it in carrying out the objectives and purposes thereof.

SECTION 16. The commission is hereby endowed with full power and authority to do and perform any and all acts and things deemed necessary and proper to carry out the objectives and purposes of this act.

SECTION 17. All elective and appointive officers and employees of all state, district, county and municipal offices or political subdivisions thereof, the University of Mississippi and other institutions of higher learning shall co-operate with the commission and render such aid and assistance as may be requested of them by the commission.

SECTION 18. If any section, paragraph, sentence, or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision of this act, but such other part shall remain in full force and effect.

SECTION 19. This act shall take effect and be in force from and after its passage.

HOUSE BILL NO. 891
(Approved by Governor)

AN ACT APPROPRIATING $250,000.00 TO THE STATE SOVEREIGNTY COMMISSION, CREATED BY HOUSE BILL 880, REGULAR SESSION OF THE MISSISSIPPI LEGISLATURE OF 1956.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. The sum of two hundred fifty thousand dollars ($250,000.00), or so much thereof as may be necessary, is hereby appropriated out of any funds in the state treasury not otherwise appropriated, to the State Sovereignty Commission, created by house bill 880, regular session of the Mississippi Legislature of 1956, for the purposes and objects set forth therein. The state budget law shall not apply to expenditures made from this appropriation.

SECTION 2. The money herein appropriated shall be paid by the state treasurer upon warrants issued by the auditor of public accounts, which warrants shall be issued upon requisitions signed by the chairman of the State Sovereignty Commission.

SECTION 3. This act shall take effect and be in force from and after its passage.

CIVIL RIGHTS
Proposed Legislation—United States Congress

On April 25, 1956, the Committee on the Judiciary of the House of Representatives of the United States ordered favorably reported, in amended form, H.R. 627, 84th Congress, which had been introduced originally by Representative Emanuel Celler of New York. The Bill provides for the appointment of a federal commission on civil rights and makes certain amendments in civil rights acts. The proposed bill follows:

A BILL to provide means of further securing and protecting the civil rights of persons within the jurisdiction of the United States.

Introduced by Mr. Celler on January 5, 1955.

Ordered favorably reported by the full judiciary committee on April 25, 1956, in the following form:

Be it enacted by the Senate and House of

Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1956".

PART I. ESTABLISHMENT OF THE COMMISSION ON CIVIL RIGHTS

SECTION 101. (a) There is created in the Executive Branch of the Government a Commission on Civil Rights (hereinafter called the "Commission").

(b) The Commission shall be composed of six members who shall be appointed by the President by and with the advice and consent of the Senate. Not more than three of the members shall at any one time be of the same political party.

(c) The President shall designate one of the members of the Commission as Chairman and one as Vice Chairman. The Vice Chairman shall act as Chairman in the absence or disability of the Chairman, or in the event of a vacancy in that office.

(d) Any vacancy in the Commission shall not affect its powers and shall be filled in the same manner, and subject to the same limitation with respect to party affiliation, as the original appointment was made.

(e) Four members of the Commission shall constitute a quorum.

COMPENSATION OF MEMBERS OF THE COMMISSION

SECTION 102. (a) Each member of the Commission who is not otherwise in the service of the Government of the United States shall receive the sum of $50.00 per day for each day spent in the work of the Commission, shall be reimbursed for actual and necessary travel expenses and shall receive a per diem allowance of $12.00 in lieu of actual expenses for subsistence, inclusive of fees or tips to porters and stewards.

(b) Each member of the Commission who is otherwise in the service of the Government of the United States shall serve without compensation in addition to that received for such other service, but while engaged in the work of the Commission shall be reimbursed for actual and necessary travel expenses, and shall receive a per diem allowance of $12.00 in lieu of actual expenses for subsistence, inclusive of fees or tips to porters and stewards.

DUTIES OF THE COMMISSION

SECTION 103. (a) The Commission shall:

(1) Investigate the allegations that certain citizens of the United States are being deprived of their right to vote or are being subjected to unwarranted economic pressures by reason of their color, race, religion, or national origin.

(2) Study and collect information concerning economic, social and legal developments constituting a denial of equal protection of the laws under the Constitution.

(3) Appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution.

(b) The Commission shall submit interim reports to the President at such times as either the Commission or the President shall deem desirable, and shall submit to the President a final and comprehensive report of its activities, findings, and recommendations not later than two years from the date of the enactment of this statute.

(c) Sixty days after the submission of its final report and recommendations the Commission shall cease to exist.

POWERS OF THE COMMISSION

SECTION 104. (a) Within the limitations of its appropriations, the Commission may appoint a full-time staff director and such other personnel as it deems advisable, in accordance with the civil service and classification laws, and may procure services as authorized by section 15 of the Act of August 2, 1946 (60 Stat. 810; 5 U.S.C. 55a) but at rates for individuals not in excess of $50.00 per diem.

(b) The Commission may accept and utilize services of voluntary and uncompensated personnel and pay any such personnel actual and necessary traveling and subsistence expenses incurred while engaged in the work of the Commission (or, in lieu of subsistence, a per diem allowance at a rate not in excess of $12.00).

(c) The Commission may constitute such advisory committees and may consult with such representatives of State and local governments, and private organizations, as it deems advisable.

(d) All Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties.

(e) The Commission, or on the authorization of the Commission any subcommittee of two or more members, may, for the purpose of carrying out the provisions of this Act, hold such hearings and act at such times and places as

the Commission or such authorized subcommittee may deem advisable. Subpoenas for the attendance and testimony of witnesses and/or the production of written or other matter may be issued over the signature of the Chairman of the Commission or of such subcommittee, and may be served by any person designated by such Chairman.

(f) In case of contumacy or refusal to obey a subpoena, any district court of the United States or the United States court of any Territory or possession, or the District Court of the United States for the district of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a subcommittee thereof, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

APPROPRIATIONS

SECTION 105. There is hereby authorized to be appropriated out of any money in the Treasury not otherwise appropriated, so much as may be necessary to carry out the provisions of this Act.

PART II. TO PROVIDE FOR AN ADDITIONAL ATTORNEY GENERAL

SECTION 111. There shall be in the Department of Justice one additional Assistant Attorney General, who shall be appointed by the President, by and with the advice and consent of the Senate, who shall assist the Attorney General in the performance of his duties, and who shall receive compensation at the rate prescribed by law for other Assistant Attorneys General.

PART III. TO STRENGTHEN THE CIVIL RIGHTS STATUTES AND FOR OTHER PURPOSES

SECTION 121. Section 1980 of the Revised Statutes (42 U.S.C. 1985), is amended by adding thereto two paragraphs to be designated "Fourth" and "Fifth" and to read as follows:

"Fourth. Whenever any persons have engaged or are about to engage in any acts or practices which would give rise to a cause of action pursuant to paragraphs First, Second, or Third, the Attorney General may institute for the United States, or in the name of the United States but for the benefit of the real party in interest, a civil action or other proper proceeding for redress, or preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

"Fifth. The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law."

SECTION 122. Section 1343 of title 28, United States Code, is amended as follows:

(a) Amend the catch line of said section to read:

"1343. Civil Rights and elective franchise".

(b) Delete the period at the end of paragraph (3) and insert in lieu thereof a semicolon.

(c) Add a paragraph as follows:

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

PART IV. TO PROVIDE MEANS OF FURTHER SECURING AND PROTECTING THE RIGHT TO VOTE

SECTION 131. Section 2004 of the Revised Statutes (42 U.S.C. 1971), is amended as follows:

(a) Amend the catch line of said section to read, "Voting rights".

(b) Designate its present text with the subsection symbol "(a)".

(c) Add, immediately following the present text, three new subsections to read as follows:

"(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice

President, Presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

"(c) Whenever any person has engaged or is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States but for the benefit of the real party in interest, a civil action or other proper proceeding for redress, or preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

"(d) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law."

On April 9, 1956, the United States Attorney General had forwarded to the Senate and the House of Representatives drafts of four proposed bills on civil rights which were, on April 17, 1956, introduced in consolidated form in the House of Representatives by Representative Keating as H.R. 10579. That bill is substantially identical to H.R. 627, as approved by the House Committee on the Judiciary, above. The text of the letter of the Attorney General by which he forwarded those bills to the Congress follows:

April 9, 1956

The Vice President
United States Senate
Washington, D. C.

Dear Mr. Vice President:

At a time when many Americans are separated by deep emotions as to the rights of some of our citizens as guaranteed by the Constitution, there is a constant need for restraint, calm judgment and understanding. Obedience to law as interpreted by the courts is the way differences are and must be resolved. It is essential to prevent extremists from causing irreparable harm.

In keeping with this spirit, President Eisenhower, in his State of the Union Message, said:

> "It is disturbing that in some localities allegations persist that Negro citizens are being deprived of their right to vote and are likewise being subjected to unwarranted economic pressures. I recommend that the substance of these charges be thoroughly examined by a Bipartisan Commission created by the Congress. It is hoped that such a Commission will be established promptly so that it may arrive at findings which can receive early consideration.* * *
>
> "We must strive to have every person judged and measured by what he is, rather than by his color, race or religion. There will soon be recommended to the Congress a program further to advance the efforts of the Government, within the area of Federal responsibility, to accomplish these objectives."

I

The right to vote is one of our most precious rights. It is the cornerstone of our form of government and affords protection for our other rights. It must be safeguarded.

Where there are charges that by one means or another the vote is being denied, we must find out all of the facts—the extent, the methods, the results. The same is true of substantial charges that unwarranted economic or other pressures are being applied to deny fundamental rights safeguarded by the Constitution and laws of the United States.

The need for a full scale public study as requested by the President is manifest. The executive branch of the federal government has no general investigative power of the scope required to undertake such a study. The study should be objective and free from partisanship. It should be broad and at the same time thorough.

Civil rights are of primary concern to all our people. To this end the Commission's membership must be truly bipartisan and geographically representative.

A bill detailing the Commission proposal is submitted with this statement.

The proposed legislation provides that the Commission shall have six members, appointed by the President with the advice and consent

of the Senate. No more than three may be of the same political party. The Commission will be temporary, expiring two years from the effective date of the statute, unless extended by Congress. It will have authority to subpoena witnesses, take testimony under oath, and request necessary data from any executive department or agency. It may be required to make interim reports pending completion of a comprehensive final report containing findings and recommendations.

The Commission will have authority to hold public hearings. Knowledge and understanding of every element of the problem will give greater clarity and perspective to one of the most difficult problems facing our country. Such a study, fairly conducted, will tend to unite responsible people in common effort to solve these problems. Investigation and hearings will bring into sharper focus the areas of responsibility of the federal government and of the states under our constitutional system. Through greater public understanding, therefore, the Commission may chart a course of progress to guide us in the years ahead.

II

At present the Civil Rights Section of the Department of Justice is one of a number of sections located within the Criminal Division. The protection of civil rights guaranteed by the Constitution is a governmental function and responsibility of first importance. It merits the full direction of a highly qualified lawyer, with the status of Assistant Attorney General, appointed by the President with the advice and consent of the Senate.

In this area, as pointed out more fully below, more emphasis should be on civil law remedies. The civil rights enforcement activities of the Department of Justice should not, therefore, be confined to the Criminal Division.

The decisions and decrees of the United States Supreme Court relating to integration in the field of education and in other areas, and the civil rights cases coming before the lower federal courts in increasing numbers, are indicative of generally broadening legal activity in the civil rights field.

These considerations call for the authorization of an additional Assistant Attorney General to direct the Government's legal activities in the field of civil rights. A draft of legislation to effect this result is submitted herewith.

III

The present laws affecting the right of franchise were conceived in another era. Today every interference with this right should not necessarily be treated as a crime. Yet the only method of enforcing existing laws protecting this right is through criminal proceedings.

Civil remedies have not been available to the Attorney General in this field. We think that they should be. Criminal cases in a field charged with emotion are extraordinarily difficult for all concerned. Our ultimate goal is the safeguarding of the free exercise of the voting right, subject to the legitimate power of the state to prescribe necessary and fair voting qualifications. To this end, civil proceedings to forestall denials of the right may often be far more effective in the long run than harsh criminal proceedings to punish after the event.

The existing civil voting statute (section 1971 of Title 42, United States Code) declares that all citizens who are otherwise qualified to vote at any election (state or federal) shall be entitled to exercise their vote without distinction of race or color. The statute is limited, however, to deprivations of voting rights by state officers or other persons purporting to act under authority of law. In the interest of proper law enforcement to guarantee to all of our citizens the rights to which they are entitled under the Constitution, I urge consideration by the Congress and the proposed Bipartisan Commission of three changes.

First, addition of a section which will prevent anyone from threatening, intimidating, or coercing an individual in the exercise of his right to vote, whether claiming to act under authority of law or not, in any election, general, special or primary, concerning candidates for federal office.

Second, authorization to the Attorney General to bring injunction or other civil proceedings on behalf of the United States or the aggrieved person in any case covered by the statute, as so changed.

Third, elimination of the requirement that all state administrative and judicial remedies must be exhausted before access can be had to the federal court.

IV

Under another civil rights statute (section 1985 of Title 42 of the United States Code) conspiracies to interfere with certain rights can

be redressed only by a civil suit by the individual injured thereby. I urge consideration by the Congress and the proposed Bipartisan Commission of a proposal authorizing the Attorney General to initiate civil action where necessary to protect the rights secured by that statute.

* * *

I believe that consideration of these proposals not only will give us the means intelligently to meet our responsibility for the safeguarding of Constitutional rights in this country, but will reaffirm our determination to secure equal justice under law for all people.

Sincerely,

HERBERT BROWNELL,
Attorney General

CORPORATIONS
NAACP—South Carolina

Act No. 920 of the Acts and Joint Resolutions of the 1956 regular session of the General Assembly of South Carolina provides for an investigation into activities of the National Association for the Advancement of Colored People at the South Carolina State (Negro) College. That act follows:

A Joint Resolution To Provide For The Appointment Of A Committee To Investigate The Activity Of The National Association For The Advancement Of Colored People At The South Carolina State College At Orangeburg.

Whereas, the General Assembly believes that the National Association for the Advancement of Colored People has as its major objective the fomenting and nurturing of a bitter feeling of unrest, unhappiness and resentment among the members of the Negro race with their status in the social and economic structure of the South; and

Whereas, the result of this concentrated, organized and well-financed effort is to increase the tension between the two races to the extent that amicable and friendly relations, so common in the past, have deteriorated and have become extremely difficult; and

Whereas, the General Assembly is informed that the National Association for the Advancement of Colored People has been very active among the faculty and student body of the South Carolina State College at Orangeburg; and

Whereas, the General Assembly is desirous of discovering to what extent the faculty and students of the South Carolina State College have become involved with the work and membership of the National Association for the Advancement of Colored People, either as ordinary workers or in a policy-making status; and

Whereas, the General Assembly is desirous of knowing that if the faculty and students of the South Carolina State College have actually become involved with the National Association for the Advancement of Colored People, then to what extent such participation has served to mislead the Negro citizens, and whether or not such activities among the faculty and students have been detrimental to the welfare of the college and its students. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. A committee of nine shall be appointed as follows: three by the Governor from the State at large, three by the President of the Senate from the membership of that body, and three by the Speaker of the House of Representatives from the membership of that body. The committee shall convene within ten days after appointment and shall organize itself by electing a chairman. Thereafter, the committee shall meet on the call of the chairman.

SECTION 2. The committee shall make an investigation of the activities of the National Association for the Advancement of Colored People among the faculty and students of the South Carolina State College, and shall determine what individuals at the college are members of and sympathizers with the National Association for the Advancement of Colored People. The committee shall further determine the extent of participation of the faculty and students in the activities of the National Association for the Advancement of Colored People, and whether or not the faculty and students are serving to mislead the Negro citizens and foment and nurture ill feeling and misunderstanding between the White and Negro races;

and whether or not the activities of the faculty and students are detrimental to the welfare of the college, its students and the State of South Carolina as a whole.

SECTION 3. The members of the committee shall be allowed a per diem of ten dollars and mileage of seven cents per mile for each day that the committee meets, and such expenses shall be paid from the General Fund of the State upon warrants signed by the chairman of the committee.

SECTION 4. The committee shall have the power to subpoena such witnesses and records as may be necessary to the investigation. The committee shall take such testimony as is necessary under oath.

SECTION 5. The committee shall submit its report to the General Assembly within sixty days after appointment.

SECTION 6. All acts or parts of acts inconsistent herewith are hereby repealed.

SECTION 7. This act shall take effect upon approval by the Governor.

Approved the 16th day of March, 1956.

ADMINISTRATIVE AGENCIES

EDUCATION
Public Schools—Kentucky

On March 1, 1956, the Board of Education of Cynthiana, Kentucky, adopted a resolution providing for racial integration of certain high school classes to become effective in September, 1956. An excerpt from the minutes of the board follows:

"In compliance with the Supreme Court's decision of May 17, 1954, the Board voted unanimously to start integrating grades 10-12 of Banneker Colored School with the Cynthiana High School, effective September 1956. Present plans call for maintaining Banneker School as a Junior High School, grades 1-9, with no integration below grade 10. The Board was influenced in its decision by the fact that the State Department of Education will no longer continue to accredit Banneker as a high school since it does not have as many as 100 pupils in the upper four grades".

EDUCATION
Public Schools—Kentucky

On February 21, 1956, the Board of Education of the City of Hazard, Kentucky, approved a plan calling for gradual integration of the public schools of that city. The board's recapitulation of the plan is as follows:

HAZARD CITY SCHOOLS
SCHOOL TERM BEGINNING SEPTEMBER 1956
INTEGRATION BEGINNING SEPTEMBER 1956 RECAPITULATION

Grade Start of Integration	Grade At time of Integration	Class	
—	1	1969	Sept. 1957—Voluntary Integration
1	3	1968	Sept. 1958—Voluntary Integration
2	5	1967	Sept. 1959—Voluntary Integration
3	7	1966	Sept. 1960—Voluntary Integration
4	8	1965	Sept. 1960—Voluntary Integration
5	9	1964	Sept. 1960—Compulsory Integration—Class 1964
6	9	1963	Sept. 1959—Compulsory Integration—Class 1963
7	9	1962	Sept. 1958—Compulsory Integration—Class 1962
8	9	1961	Sept. 1957—Compulsory Integration—Class 1961
9	9	1960	Sept. 1956—Compulsory Integration – Classes 1957, 1958, 1959, and 1960.
10	10	1959	
11	11	1958	
12	12	1957	

EDUCATION
Public Schools—Maryland

On February 27, 1956, the Harford County, Maryland, Citizens Consultant Committee adopted a resolution recommending the ending of racial segregation in the public schools effective in September, 1956. The Harford County Board of Education subsequently approved and adopted the plan. The committee resolution follows:

To recommend to the Board of Education for Harford County that any child regardless of race may make individual application to the Board of Education to be admitted to a school other than the one attended by such child, and the admissions to be granted by the Board of Education in accordance with such rules and regulations as it may adopt and in accordance with the available facilities in such schools; effective for the school year beginning September, 1956.

EDUCATION
Public Schools—Maryland

In June, 1955, the Board of Education of Kent County, Maryland, issued a Statement of Policy concerning the admission of pupils to public schools of that county without regard to race or color. On April 17, 1956, the Board adopted an implementing policy which would commence desegregation in the 1956-57 school year. The two statements follow:

STATEMENT OF POLICY BY BOARD OF EDUCATION
[JUNE, 1955]

The Kent County Board of Education, making its start toward the desegregation of county schools, named a Lay Advisory Committee on Tuesday, the duties of which will be to assist the Board in its "deliberations and formation of policies".

The make-up of the committee was not announced pending acceptance or rejection of the invitation to serve.

The Board also submitted a list of legal and administrative questions to the Attorney General and State Board of Education. Pending advice and direction from these sources the local board will not act.

The complete statement of the Kent Board in reference to the May 1 decision of the Supreme Court is:

"The Board of Education of Kent County is a legally constituted governmental body of Maryland. The individual members of the Board and the professional employees have each signed an oath affirming his support of the laws of the United States of America, the laws of the State of Maryland and the by-laws of the State Board of Education. The Kent County Board of Education recognizes its responsibility and obligation to operate the public schools under its jurisdiction in accordance with the laws of the Nation, the State and the by-laws of the State Department of Education and also in accordance with the desires of the citizens of Kent County to the extent that such desires are consistent with the above mentioned acts and by-laws.

"The May 31st decree of the Supreme Court clearly stated that pupil racial segregation in the public schools is unconstitutional and that any 'State or Local Law requiring or permitting such discrimination must yield to this principle'. The decision further states that the force of 'these constitutional principles cannot be allowed to yield simply because of disagreement with them'. The Court recognized that the local problems to be solved in implementing the decree would vary from community to community and that the primary responsibility for solving these problems will fall upon local Boards of Education and local school officials. However, the Court clearly requires the end of pupil racial discrimination

in the operation of public schools as soon as practicable and that a 'prompt and reasonable start' be made. The Kent County Board of Education urges everyone to read and become familiar with the decision as published in the press.

"As a legally constituted public body the Board of Education of Kent County, Maryland, must, of course, proceed to comply with the decision. It will attempt to do so 'in a fair, decent and legal manner and with good common sense'. There are problems of building facilities, transportation, course offerings, etc., which will need to be solved. This will take time and require patience. To assist the Board in its deliberations and in the formation of policies related to these problems a group of representative citizens is being invited to serve as a Lay Advisory Committee. In addition a list of legal and administrative questions has been referred to the Attorney General and State Board of Education. Every effort will be made to formulate a feasible program of desegregation and to carry it out in an orderly manner. The Kent County Board of Education must await further advice and direction before proceeding in this matter. To do otherwise at this time would be premature."

BOARD OF EDUCATION OF KENT COUNTY
CHESTERTOWN, MARYLAND

April 17, 1956

The regular monthly meeting of the Kent County Board of Education was held on April 17. At that time the Board unanimously approved and adopted the recommendation the Lay Advisory Committee made on April 5. That recommendation is as follows:

> "That the Committee go on record as advocating to the Board of Education that voluntary desegregation commence at the elementary school level and if at the discretion of the Board of Education it would be practicable to include the higher grades such action would be acceptable to this Committee."

In implementing this recommendation the Board will be guided by established transfer policies, by the administrative feasibility of granting transfer requests and by the policy statement it issued in June 1955.

Annually it has been customary for the principal of each school to have completed the registration for the approaching school year by May 1. For the school year 1956-57 this date is extended to May 18. Each principal has been requested to receive the application from any parent who applies for the admission of his child to a certain school. Upon the completion of the registration each principal submits a summary report to the Board of Education office. This practice is to be continued. Requests for transfers will be reviewed by the Board of Education and handled in accordance with established policies, available facilities and administrative feasibility.

It shall continue to be the aim and desire of the Kent County Board of Education and school officials to operate the public schools of the County in a manner that provides the best possible services and facilities for all pupils concerned. In this undertaking the continued cooperation and support of the public is solicited.

Members
Board of Education of Kent County

EDUCATION
Public Schools—Maryland

The Board of Education of Montgomery County, Maryland, on March 21, 1955, issued a statement of policy with respect to school integration. This statement was followed by a proposed plan, issued April 23, 1956. The statement and plan follow:

STATEMENT OF POLICY ON INTEGRATION

by Board of Education

[March 21, 1955]

In recognition of the Supreme Court ruling of May 17, 1954, that segregation in public school education is unconstitutional, the Montgomery County Board of Education affirms its intention to proceed to integrate the public school system of Montgomery County in an orderly and just manner. In so doing, the Board of Education also acknowledges the moral and democratic implications of the ruling, and regards compliance as an opportunity to extend all of its educational programs and facilities to all the children on an impartial basis.

The Board of Education is making a study and analysis of the problems involved in desegregation, of the Report of the Citizens' Advisory Committee as well as the minority reports received from the members of that Committee, and of the materials and communications received by the Board of Education and its members.

In order to develop a plan of operation for the desegregation of the Public School of Montgomery County to be put in operation when the legal obstacles have been removed, the Board adopts the following basic principles:

I—Upon receipt of a ruling or advice from the Attorney General of the State of Maryland that there is no legal barrier existing in Maryland to the integration of all students in Public Schools, the Board of Education will instruct its Superintendent to place in operation its program of integration.

II—The primary consideration of the Public Schools shall continue to be the educational needs of the pupils.

III—The same policy of integration shall prevail throughout the County, provided, however, the Superintendent, with the approval of the Board, shall have discretion to vary the timing of integration as conditions warrant.

IV—The integration of Board of Education employees shall be accomplished at the same time as the integration of pupils.

V—Employment and placement of all personnel shall be based on relative merit established by personal and professional qualifications for the requirements of any particular vacancy.

VI—School district lines shall be drawn without regard to race; pupils shall attend the school of their district unless by special permission of the School Administration.

VII—Wherever necessary there shall be a realignment of school districts or a reassignment of pupils to accomplish proper use of existing facilities; new facilities shall be provided as promptly as possible to relieve overcrowded conditions.

VIII—Wherever a pupil in a secondary school desires a particular course or courses, not available at the school which he would normally attend, the pupil shall have the option to go to a school that will provide the course desired. These decisions shall be made by the Board of Education in accordance with present administrative policies but without regard to race.

IX—Changes would normally become effective at the beginning of a school year.

PROPOSED PLAN OF INTEGRATION FOR 1956-57

[April 23, 1956]

In furtherance of the statement of the Board's Policy on Integration adopted March 21, 1955, and as requested by the Board April 10, 1956, the Superintendent has submitted the following proposals to be effective as of the start of the school year 1956-57:

A. Where classroom space and transportation service are available, and where it is deemed to be in the best interest of the pupil, to permit pupils to transfer, if the parents or guardians agree, from the Taylor, Longview, Sandy Spring, Rock Terrace, Lincoln and Carver schools to the school nearest to the residence of the pupil, subject in all cases to the approval of the Superintendent, and provided that any pupil who transfers from one of the above named schools, as herein provided, shall be permitted at his reuest and with the acquiescence of his parents or guardians, to return to said school at any time.

B. Pupils attending any other school in the County will be granted the privilege of transferring to another school in the system, upon the same conditions as set forth in Paragraph A, above.

C. Any details of transfer under "A" and "B"

will be made through the usual channels with the appropriate school principal and Superintendent.

D. All reasons for delay or denial of requests for transfer from one school to another will be made known to the person making such application.

E. Personnel policies will be adhered to as outlined in the action taken March 21, 1955.

EDUCATION
Public Schools—Maryland

In a resolution adopted recently, the Board of Education of Prince George's County, Maryland, announced its policy toward assignment of pupils to public schools in the county. The policy provides for the choice, subject to certain restrictions, by the pupil of the school he will attend. The resolution follows:

BE IT HEREBY RESOLVED, that the Board of Education of Prince George's County adopt the following policy for the operation of its public schools in conformance with the decree of the Supreme Court, May 31, 1955 and with the resulting opinion as announced by the Attorney General of Maryland:

1. That the policy of enrollment in the public schools of the County shall be one of individual choice subject to the availability of building facilities, transportation services and to the approval of the Board of Education of Prince George's County.

2. Insofar as it is administratively possible and practical, every child shall have the choice of:
   a. attending his nearest school
   b. attending his present school
   c. requesting a transfer to another school which is signed by a parent or guardian and subject to the approval of the Board of Education.

3. The request for transfers may be made between the first Friday in May and the first Friday in June and the applicant will be notified of Board action on the request by July 15th.

4. All transfers will be handled through the usual and normal channels of the Office of the Superintendent of Schools.

5. While the Board has no intention of compelling a pupil to attend a specific school or deny him the privilege of transferring to another school, the Board does reserve the right, during this period of adjustment, to delay or deny the admission of a student to any school if it deems such action wise, necessary and in the best interest of public safety and community welfare. All reasons for delay or denial of the request will be made known to the applicant.

EDUCATION
Public Schools—Tennessee

"Statement of March 31, 1956, by the Chattanooga Board of Education with reference to the decisions of the United States Supreme Court on May 17, 1954, and May 31, 1955, on the subject of racial discrimination in the public schools."

Events in the last year have convinced the Chattanooga Board of Education that the community will not accept any form of integration within the city schools at any time within the near future. We, therefore, take this opportunity to report to the community our decision to postpone any change in the public schools for a period of at least a few years—probably five years or more. Because of organizational problems confronting the schools now, the de-

cision could not be longer postponed, and we feel that the public is entitled to have this information without delay.

We believe this to be in harmony with the spirit of the two U. S. Supreme Court rulings on the question.

We believe our decision will not harm any child of either race. We believe this action to be a good faith compliance with the supreme law of the land.

Following the Supreme Court decision of May, 1955, we announced, after careful thought and consideration, our statement of policy regarding the matter of segregation in the operation of our public school system. As we started our search for an answer we said that there would be no change in the operation of our schools for the school year commencing in September, 1955.

We have proceeded in good faith, in line with our announced policy, to seek a solution to our problem. We have talked with many people; we have studied the law; we have taken note of plans and developments in other communities; we have observed every development; for in our hearts and in our prayers this problem has been constantly with us. We have asked every citizen of Chattanooga to help us in our efforts to find a legal solution which would harm no child of either race, and we are grateful to those good citizens who have shared their thinking with us. From the outset we have realized that the answer must be found in the hearts of the citizens of our community.

We have said that we will comply with the law. We have said that this means we will comply with the law as we understand it as we read the words used by the United States Supreme Court. As a result of all that has happened in our community and elsewhere, we are firmly convinced that any measure of integration within the foreseeable future would do the community irreparable damage. The cause of public education has already suffered severe damage. Hasty action could result in harm to the welfare of our children to an extent unknown. The quality of all education at all levels would suffer. No one would gain. Everyone would lose from too hasty action.

As a Board of Education, our duty is not to make the law or to say the law is right or wrong. It is our duty to operate the schools to the best of our ability for the benefit of the children within the legal framework that binds us. Our personal feelings have no proper place in the decision to comply with the law.

We do not believe the Court will require us to take a step that will destroy much of the progress the public schools of Chattanooga have made during the last 25 years.

We do not believe the Court will require us to take a step that we believe in good faith would be detrimental to the well-being of all of our children.

In this dilemma, our primary responsibility is to make the problem clear to the community. This is what the Court's words mean to us. Before any problem can be solved, the exact nature of the problem must be known to those who must solve it. Some 150,000 Chattanoogans are involved in this problem; and every single one has an opinion on the problem. Yet events have proven that this issue is so close to the hearts of all of us that emotions prevent a discussion of the issue. It has proven impossible to discuss the question in a calm manner with many people. Sooner or later our emotions overcome us.

As a result, we have not been able to make the problem clear to our fellow citizens. Misunderstanding has increased almost daily. Normal friendly relations have worsened.

Your Board hopes this breathing spell may restore a spirit of good will to our community, an atmosphere where free discussion is possible without bitterness and hate. We feel that such a period is essential if the problem is ever to be solved without results that none of us would knowingly seek.

The Court told us to elucidate the problem. To date that has been impossible. Yet that first step is essential. Were we to skip the first step of making the problem clear, we would be violating the Court's ruling.

During this period of time we will exert every effort to improve our schools, yet working always within the framework of the law as we understand it. For the future only the people of this community and developing circumstances here and elsewhere can point the way to a fair solution.

CHATTANOOGA BOARD OF EDUCATION

EDUCATION
Teachers—Georgia

The Georgia State Board of Education adopted a resolution calling attention to the membership of an individual retired from the university system of the state in an organization "apparently repugnant to the thinking of the members" of the Board on the issue of segregation and requesting the Board of Trustees of the Teacher Retirement System of Georgia to discontinue the payment of retirement benefits to the individual. The Board of Trustees, on March 21, 1956. adopted a resolution stating that it had no authority to so stop retirement benefits. The resolution of that Board follows:

WHEREAS, The State Board of Education adopted a resolution calling attention to the service of one Dr. Guy Wells with an organization which is apparently repugnant to the thinking of the members of the State Board of Education, and

WHEREAS, The resolution calls on the Board of Trustees of the Teacher Retirement System of Georgia to discontinue the payment of retirement benefits to the said Dr. Guy Wells if legally possible, and

WHEREAS, The request to stop the payment of retirement benefits to a retired person raises a question of terrific impact on the future rights, welfare and security of 1,821 teachers now retired and the 30,529 members of the Teacher Retirement System who are now purchasing retirement benefits and on the rights of the members of the State Employees' Retirement System, the Peace Officers' Pension System, The Firemen's Pension System and all members of all other duly established pension or retirement systems, the Board of Trustees of the Teacher Retirement System deems it necessary at this time to definitely and positively resolve the question raised by the resolution of the State Board of Education as it pertains to the Teacher Retirement System of Georgia.

WHEREAS, During the term of employment of a member of the Retirement System the member contracts to pay premiums equal to 5% of his compensation for retirement benefits for which upon reaching retirement age or reaching a condition where disability benefits are payable, the Board of Trustees by law does contract to pay the member certain retirement benefits based on the amount of benefits purchased by and for said member, and

WHEREAS, At the time of retirement of an employee the employer, employee relationship which makes an employee amenable to the policies of his previous employer ceases to exist, and

WHEREAS, The retired member continues to have the right of exercising his privileges of citizenship guaranteed to him under the Constitution of this State under the provision of the Constitution which reads in part as follows: "No law shall ever be passed to curtail, restrain the liberty of speech, or of the press; any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty", and

WHEREAS, It is the consensus of opinion of the Board of Trustees of the Teacher Retirement System that any retired member has the inalienable right to exercise his privileges of a citizen of this State even though his views and activities may be repugnant to any candidate for public office, any holder of public office or any other person or group of persons, and

WHEREAS, It has been held through all the courts of these United States that a person entitled to retirement benefits has acquired a vested right to those benefits under his contract beginning at the date of retirement and that the benefits cannot be stopped, reduced or affected in any manner for the remaining period of life of the person retired or the designated beneficiary, and

WHEREAS, The Board of Trustees of the Teacher Retirement System has thoroughly studied the request of the State Board of Education as it pertains to Dr. Guy Wells and has made a thorough investigation as to the impact of this request on the membership of the Retirement System, we do therefore,

RESOLVE, That the Board of Trustees of the Teacher Retirement System is without authority to stop or curtail the benefits payable to a

retired member during his or his beneficiary's remaining years of life, be it further

RESOLVED, That the Executive Secretary be directed to forward a copy of this resolution to each retired member and to each active member of the Teacher Retirement System of Georgia so that they can be reassured as to the stability of their retirement benefits anticipated and to which they are entitled when they reach retirement age.

MARCH 21, 1956

ATTORNEYS GENERAL

PUBLIC ACCOMMODATIONS
"Summer Camps"—New Jersey

The Attorney General of New Jersey was requested for an opinion whether the New Jersey "Law Against Discrimination" was applicable to summer camps operated by religious or sectarian institutions. The Attorney General expressed the opinion that such camps were not subject to the act if they were limited to attendance by members of a particular creed or religious or sectarian institution. The opinion follows:

December 8, 1955

Honorable John P. Milligan
Director, Division Against Discrimination
Department of Education
162 West State Street
Trenton, New Jersey

FORMAL OPINION 1955–No. 42

Dear Dr. Milligan:

You have requested our opinion as to whether the Law Against Discrimination (N.J.S.A. 18: 25-1 et seq.) applies to summer camps operated by bona fide religious or sectarian institutions. We understand that your inquiry refers to summer camps maintained for children of school age rather than to recreational vacation facilities for adults.

We have reached the conclusion that if such a camp caters to the public generally, it is covered by the Law Against Discrimination as a "place of public accommodation"; but if attendance at the camp is limited to members of a certain creed or of a particular religious or sectarian institution, it is not subject to that law.

The law prohibits discrimination because of race, creed or color in the admission of persons to "any place of public accommodation" (N.J.S.A. 18:25-12(f)). Section 18:25-5(j) of the law provides in part as follows:

> "'A place of public accommodation' shall include any tavern, roadhouse, or hotel, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; * * * swimming pool, amusement and recreation park * * * gymnasium * * * kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include, or to apply to, any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed."

The term "place of public accommodation" is clearly broad enough to include summer camps for children. The word "accommodation" has been defined as "whatever supplies a want or affords ease, refreshment, or convenience; anything furnished which is desired or needful". *Powell v. Utz,* 87 F. Supp. 811, 814 (D. C. Wash. 1949). In construing the term "place of public accommodation, resort or amusement" in the old civil rights statute of New York, which was penal and therefore strictly construed, the New York Court of Appeals used the following broad language (*Johnson v. Auburn & Syracuse Electric R. Co.,* 119 N.E. 72, 73, 222 N.Y. 443 (1918)):

> "Those places include each of those utilities, facilities and agencies created and operated for the common advantage, aid, and benefit of the people, the denial of which to any person would be a discriminatory obstruction or deprivation in achieving prosperity, health, development, or happiness."

The New Jersey law provides (N.J.S.A. 18: 25-27) that the act "shall be construed fairly and justly with due regard to the interests of all parties." Since our Law Against Discrimination is not penal, and in view of the mandate of the Legislature just quoted, the term "place of public accommodation" should be construed as embracing all facilities which can fairly be brought within its range.

Summer camps are not mentioned in the long list of facilities contained in Section 18:25-5(j). This fact is not controlling, however, because the enumeration in that section is not all-inclusive. See *State v .Rosecliff Realty Co.*, 1 N. J. Super. 94 (App. Div. 1948), where the Appellate Division held that swimming pools were within the orbit of the old Civil Rights Law (R.S. 10:1-2, 5) even though not specifically mentioned therein.

According to the Court, the Legislature intended that "broad scope" should be given to the phrase "place of public accommodation, rest or amusement", and that any facility reasonably falling within that broad scope was subject to the law.

Adopting that view here, we think that summer camps for children, if open to the public, come within the purview of the Law Against Discrimination. The maxim *ejusdem generis*, applied to the construction of our Statute, leads to the same result, since summer camps have many attributes in common with hotels, swimming pools, recreation parks and schools, all of which are included in the statutory definition as examples of places of public accommodation.

Our conclusion is further supported by *Camp-of-the-Pines, Inc. v. New York Times Co.*, 184 Misc. 389, 53 N.Y.S. 2d 475 (Sup. Ct. 1945), where the New York Court ruled that the civil rights law of New York applied to a vacation camp in the Adirondack Mountains. The court found that such a camp was a "place of public accommodation, resort or amusement" within the meaning of that law, even though not specifically defined therein as such.

We turn now to the two exceptions contained in the above quoted proviso to section 18: 25-5(j): (1) any institution, bona fide club, or place of accommodation, which is in its nature distinctly private"; and (2) "any educational facility operated or maintained by a bona fide religious or sectarian institution."

We will not attempt to discuss here what circumstances might bring a summer camp for children within the exception of a "place of accommodation, which is in its nature distinctly private." This subject frequently presents difficulties, and the question can only be answered satisfactorily in the light of the particular setting in which it arises. We can say, however, that if attendance at the camp is confined to the members of a bona fide religious or sectarian institution, it would be "distinctly private" within the meaning of the exception. On the other hand, the camp would not be exempt merely because of its operation by an agency or institution which itself may be private. It is the nature of the facility in question, rather than the agency maintaining it, that determines whether or not the Law Against Discrimination is applicable. *Delaney v. Central Valley Golf Club*, 289 N.Y. 577, 43 N.E. 2d 716 (1942).

On the question of whether a summer camp for children is an "educational facility" within the meaning of the exception hereinabove quoted, a broad use of those words might well require an affirmative answer, since the term "education" can denote the developing or cultivating of the entire personality of the individual —body, mind and heart. *In Re Moses' Estate*, 138 App. Div. 525, 123 N.Y.S. 443 (1910). We are persuaded, however, that as used in the above quoted proviso, the phrase "educational facility" refers back to and denotes only the facilities enumerated in Section 18:25-5(j), i.e. any kindergarten, primary or secondary school, etc.

The statutory phrase "educational facility" appears to have been used synonomously with the term "educational institution", the ordinary meaning of which is a place where classes are conducted, such as schools and colleges. *Board of National Missions v. Neeld*, 9 N.J. 349, 354 (1952); *Lois Grunow Memorial Clinic v. Oglesby*, 22 P. 2d 1076, 1078, 42 Ariz. 98 (1933), and cases there cited.

In view of the beneficent purposes of the statute, the language of the exception should not be given a broader import than its ordinary connotation.

Yours very truly,
GROVER C. RICHMAN, JR.,
Attorney General
By:
Thomas P. Cook,
Deputy Attorney General

STATE ACTION

A Study of Requirements Under the Fourteenth Amendment

Section One of the Fourteenth Amendment to the Constitution of the United States reads in part:

> "*No State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall *any State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (italics supplied).

The Fifteenth Amendment (Section One) reads:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by *any State* on account of race, color, or previous condition of servitude." (italics supplied.)

Limitations on States

It is readily seen that the language of both amendments sets forth express limitations upon the power of a state to regulate individual behavior and thereby creates constitutional rights in individuals as against a state. Unlike the Fourteenth Amendment, the Fifteenth Amendment limits the action not only of the states but of the federal government as well. Apart from this latter aspect, persons who claim an infringement of their constitutional rights as secured to them by these quoted provisions of the Fourteenth and Fifteenth Amendments must attribute the alleged unconstitutional action to a state. Such a showing of "state action" is essential, even in those cases that arise from the exercise by Congress of its powers of enforcement under Sections Five and Two respectively of these amendments. These latter sections are often referred to as the Enabling Provisions and simply state that Congress has power to enforce the rights secured by the amendments by appropriate legislation.

At various times, during the years following the Civil War, Congress enacted (and in some instances later repealed) statutes providing penalties for persons who violate the rights of other persons deemed by Congress to be protected by the Amendments. These statutes are usually referred to collectively as the Civil Rights Acts. Thus, the cases examined in this Study arise in two major contexts: (1) At times individuals invoke the Fourteenth and Fifteenth Amendments directly, seeking protection of alleged constitutional rights, not by virtue of the Civil Rights Acts passed by Congress, but solely on the power and duty of the courts to enforce the Constitution in cases pending before them; (2) At other times, the cases arise under the application of the Civil Rights Acts. In either context, the action complained of must be "state action," but the definition of "state action" does not seem to be affected materially by its arising in one of these contexts as opposed to the other. The central thread, then, of this Study is always the definition of the term "state action" as historically considered by the courts, with especial emphasis on the cases decided by the United States Supreme Court and on cases in which the "state action" involves the question of racial discrimination.

Other Constitutional Protection

Cases involving questions of alleged racial discrimination may arise under other provisions of the Constitution than the Fourteenth and Fifteenth Amendments, and under federal statutes that do not rest for their validity on these two amendments. Although such cases are not within the scope of this Study, in the usual situation those other provisions in the Constitution that are pertinent to race relations are not limited in their application to state action but reach discriminatory individual and corporate action as well. For example, Congress under its power to regulate interstate commerce can restrict state, corporate, and individual action. In addition, neither an individual nor a state may place an undue burden on interstate commerce even in the absence of Congressional enactment. *Morgan v. Virginia*, 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317 (1946); see *White-*

side v. Southern Bus Lines, 177 F.2d 949 (6th Cir. 1949). Moreover, the Thirteenth Amendment, which abolishes slavery and involuntary servitude, is not a limitation confined to state action. Although the enabling clause of this amendment empowers Congress to reach private as well as state action, the Supreme Court has consistently construed this amendment strictly to encompass factual situations of bondage or peonage. It is, consequently, of limited scope. *Civil Rights Cases,* 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883) and see e.g. *Bailey v. Alabama,* 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191 (1911); *Pollack v. Williams,* 322 U.S. 4, 64 S.Ct. 792, 88 L.Ed. 1095 (1944). Congress can also reach private as well as state action through the power granted by Article 1, Sections 2 and 4 of the Constitution, which authorize Congress to regulate Congressional elections. *United States v. Classic,* 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941).

It is obviously important to distinguish these several situations from claims arising under the Fourteenth and Fifteenth Amendments, where the requirement of "state action" persists. Although the Civil Rights Acts usually fall in the latter category, if other grants of Congressional power can be invoked, these laws can reach individual and corporate actions as well as state action. *Ex parte Yarbrough,* 110 U.S. 651, 46 S.Ct. 152, 28 L.Ed. 274 (1884); cf. *Collins v. Hardyman,* 341 U.S. 651; 71 S.Ct. 937, 95 L.Ed. 1253 (1951). Thus, the Supreme Court has held that the Civil Rights Acts could reach persons who drove a homesteader from lands settled by him pursuant to a federal grant, although no action of a state was involved. *United States v. Waddell,* 112 U.S. 76, 5 S.Ct. 35, (1884). The Court placed its decision, not on the Fourteenth *or* Fifteenth Amendments, but on Article IV, Section 3, of the Constitution, which vests power in Congress over the territory or other property of the United States. The Court similarly held that the Civil Rights Acts reached defendants who committed violence against prisoners in the custody of the United States marshal, *Logan v. United States,* 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1892). *Motes v. United States,* 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900) held that the Civil Rights Acts were applicable to persons who murdered informers to federal revenue agents. In the last two cases, the Supreme Court did not have to consider whether the deeds complained of resulted from state action within the Fourteenth and Fifteenth Amendments. Other provisions of the Constitution, authorizing Congress to pass laws to carry out powers specifically granted to it, permitted the federal authorities to protect marshals and revenue agents and to punish crimes against them while in the performance of their duties.

It should be noted, parenthetically, that the definition of state action as discussed in this Study is not controlling for purposes of defining the restriction of suits against a state prohibited by the Eleventh Amendment. *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

I. State Action Does Not Include Purely Private Action

The opinion in the *Civil Rights Cases,* 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883) is generally considered the most important single pronouncement by the Supreme Court that the Fourteenth Amendment does not limit "purely" or "merely" individual or private action, but reaches instead only the action of a state. Prior to that case, however, the Supreme Court had decided three cases on which it relied in establishing its interpretation set out in the *Civil Rights Cases.*

United States v. Cruikshank

The first of these cases was *United States v. Cruikshank,* 92 U.S. 542, 23 L.Ed. 588 (1875). It reached the Supreme Court from a federal court in Louisiana which had arrested judgments against defendants who had been indicted for violating an Act of Congress known as the Enforcement Act. The Act provided for criminal punishment if two or more persons should:

> "band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same."

The defendants being prosecuted by the federal government for violating the Act were a part of a group of some one hundred persons. Ac-

cording to the indictment, they had banded together and conspired to keep Negroes from peaceably assembling together, and from bearing arms; to deprive Negroes of their life and liberty; to deny Negroes the equal protection of the laws of the state and of the United States; to deny Negroes the right to vote; and generally to discriminate against Negroes. The Supreme Court disposed of a number of the sixteen counts in the indictment on the ground that they were too vague and lacked the precision required to convict persons in criminal proceedings.

In discussing the Fourteenth Amendment, however, the Supreme Court through Mr. Chief Justice Waite said in speaking specifically of the Due Process and Equal Protection clauses:

> "[They do not] add anything to the rights which one citizen has against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty." 92 U.S. at 554, 555.

In discussing the counts of the indictment the Supreme Court made the distinction between those rights that are attributes of national citizenship and those that are attributes of state citizenship, citing the *Slaughter-House Cases*, 16 Wall. 36, 21 L.Ed. 394 (1873).

> "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case." 92 U.S. at 552, 553.

The Court further stated that allegations concerning discrimination in the right to vote might have been properly within the statute had the indictments been more carefully drawn. Mr. Justice Clifford, though agreeing that the judgments against the defendants should be arrested, dissented from the reasons of the Court. The result of the case was that the defendants were freed so far as these prosecutions were concerned.

Virginia v. Rives

The second case leading to the opinion in the *Civil Rights Cases* was *Virginia v. Rives*, 100 U.S. 313, 25 L.Ed. 667 (1880). Two Negroes were indicted for murder in Virginia. At their trial in the state court they asked that the venire from which the jury would be selected be composed of one-third Negro members. The state judge denied the motion. The Negroes then sought to have their case tried in a federal rather than the state court, and a federal judge permitted a United States marshal to keep defendants in custody, away from the reach of the state court, for further proceedings in the federal court. In its turn, the State of Virginia sought a writ of mandamus from the Supreme Court of the United States to compel the federal judge to release the prisoners to the State of Virginia. The argument for the Negroes before the United States Supreme Court invoked a Congressional statute that permitted cases to be removed to federal courts:

> "When any civil suit or prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States."

The Supreme Court declared that the statute rested upon the power of Congress to enforce the Fourteenth Amendment and stated:

> "The provisions of the Fourteenth Amendment of the Constitution . . . all have reference to State action exclusively, and not any action of private individuals. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored

men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against State infringement of those rights. . . . It is doubtless true that a state may act through different agencies—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State." 100 U.S. at 318.

The Court concluded that although Congress could remove cases involving racial discrimination by officers of the state judiciary, the terms of the statute as passed by Congress had provided for removal in such cases only before trial, not after its commencement; that the Negro defendants had sought to remove their case after the trial in the state court had already begun. The Court also held that the Constitution does not guarantee a jury composed of both white men and Negroes in every case in which a Negro is tried; rather, the right guaranteed is that "in the selection of jurors to pass upon . . . life, liberty or property, there shall be no exclusion of . . . race, and no discrimination . . . because of . . . color." The Negroes had not alleged the systematic exclusion of Negroes from jury duty.

Justices Field and Clifford concurred. Speaking of the Fourteenth Amendment, the concurring opinion stated:

> "As the State, in the administration of its government, acts through its executive, legislative, and judicial departments, the inhibition applies to them. But the executive and judicial departments only construe and enforce the laws of the State; the inhibition, therefore, is in effect against and enforcing any laws which are designed to accomplish the ends forbidden. If an executive or judicial officer exercises power with which he is not invested by law, and does unauthorized acts, the State is not responsible for them." 100 U.S. at 334.

The concurring opinion declared that since Virginia had no law providing for the exclusion of Negroes from juries, no state action appeared to warrant the application of the Fourteenth Amendment. All of the Justices agreed that the Negro defendants should be delivered back to the state of Virginia.

Ex Parte Virginia

The contentions of Justices Field and Clifford were definitely repudiated by a majority of the Supreme Court in *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676 (1880), decided the same term as *Virginia v. Rives*, and the third case leading to the *Civil Rights Cases*. In *Ex parte Virginia*, federal authorities arrested a Virginia judge; placed him in custody; and accused him of violating an Act of Congress that provided punishment for persons who, charged with the duty of selecting juries, discriminated against citizens on account of their color. The Supreme Court denied writs of habeas corpus by which the judge sought his freedom. It further held that discriminatory action by a state judge constitutes such state action as is within the power of Congress to reach by statutes passed pursuant to the Fourteenth Amendment:

> "Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning." 100 U.S. at 347.

Justices Field and Clifford dissented. Mr. Justice Field said in part:

> "Nothing, in my judgment, could have a greater tendency to destroy the independence and autonomy of the States; reduce them to a humiliating and degrading dependence upon the central government; engender constant irritation; and destroy that domestic tranquility which it was one of the objects of the Constitution to insure,—than the doctrine asserted in this case, that Congress can exercise coercive authority over judicial officers of the States in the discharge of their duties under State laws." 100 U.S. at 358.

The Civil Rights Cases

In the *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883) the Supreme Court interpreted an Act of Congress as not within the powers granted Congress by the post-war Amendments and declared the statute unconstitutional. Congress had enacted the statute,

one of the Civil Rights Acts in 1875. Section 1 of the Act provided:

> "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."

Section 2 provided that an aggrieved person could sue the defendant for five hundred dollars. The section also subjected the defendant to a fine of not less than five hundred dollars and not more than one thousand dollars, or a term of imprisonment of not less than thirty days nor more than one year.

Five cases testing this law reached the Supreme Court. Two of the five involved indictments brought against defendants for denying Negroes access to a hotel; two others tested actions brought against defendants who denied Negroes admission to a theater. In one of these later instances a Negro had been denied admission to the Grand Opera House in New York; in the other, a Negro had been denied admission to the dress circle of a San Francisco theater. The last of the five consolidated cases involved a civil action which a Negro and his wife, had brought against a railroad to recover the five hundred dollars authorized by the statute. They alleged that a railroad conductor had, in violation of the statute, denied the wife admission to the ladies' car because she was a Negro. Mr. Justice Bradley in his opinion for the Court discussed first the power of Congress to pass such a statute under the powers granted to Congress by the Enabling Provision of the Fourteenth Amendment. In that connection the Court said:

> "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. . . Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect." 109 U.S. at 11, 12;

and still further:

> "And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authority." 109 U.S. at 13;

and, again:

> "An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall de deemed offenses and shall be prosecuted and punished by proceedings in the Courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed." 109 U.S. at 14.

As to the Fourteenth Amendment, the Court concluded:

> "The law in question, without any reference to adverse State legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admissions to inns, public conveyances, and places of amusement. It supersedes and displaces State legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment, and, in our judgment, it has not." 109 U.S. at 19.

Validity Under Thirteenth Amendment

Having rejected the argument that the statute was valid under the Fourteenth Amendment, the Supreme Court then considered its validity under the Thirteenth Amendment. The Court declared that Congress has a right "to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents" and continued:

> "But is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theatre, of its accommodations and privileges to an individual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? Whether it might not be a denial of a right, which, if sanctioned by the state law, would be obnoxious to the prohibitions of the Fourteenth Amendment, is another question. But what has it to do with the question of slavery?" 109 U.S. at 21.

The Court then rejected the argument that the denial of these accommodations infringed the Thirteenth Amendment, and concluded:

> "On the whole we are of opinion, that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment to the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several states is concerned." 109 U.S. at 25.

Justice Harlan's Dissent

Mr. Justice Harlan gave a long dissenting opinion in the *Civil Rights Cases*. He said:

> "The Court adjudges, I think erroneously, that Congress is without power, under either the Thirteenth or Fourteenth Amendments, to establish such regulations, and that the first and second sections are, in all their parts, unconstitutional and void." 109 U.S. at 27.

As to the Thirteenth Amendment, Mr. Justice Harlan felt that its reach extended to the cases before the Court. His opinion states:

> "What has been said is sufficient to show that the power of Congress under the Thirteenth Amendment is not necessarily restricted to legislation against slavery as an institution upheld by positive law, but may be exerted, to the extent, at least, of protecting the liberated race against discrimination, in respect of legal rights belonging to freemen, when such discrimination is based upon race." 109 U.S. at 37.

After discussing the factual situations involved, Mr. Justice Harlan concluded as to the Thirteenth Amendment:

> "I am of the opinion that such discrimination practiced by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment; and, consequently, without reference to its enlarged power under the Fourteenth Amendment, the [Act of Congress] is not, in my judgment, repugnant to the Constitution." 109 U.S. at 43.

Mr. Justice Harlan then presented his interpretation of the Fourteenth Amendment as permitting Congress to reach action not limited to "state action."

> "It does not seem to me that the fact that, by the second clause of the first section of the Fourteenth Amendment, the States are expressly prohibited from making or enforcing laws abridging the privileges and immunities of citizens of the United States, furnishes any sufficient reason for holding or maintaining that the amendment was intended to deny Congress the power, by general, primary, and direct legislation, of protecting citizens of the several States, being also citizens of the United States, against all discrimination, in respect of their rights as citizens, which is founded on race, color, or previous condition of servitude." 109 U.S. at 54.

United States v. Harris

It will be noted that the *Civil Rights Cases* declared unconstitutional an Act of Congress that attempted to regulate race relations. The three cases, earlier reviewed, turned on the inapplicability of the statutes to the particular facts involved in the case; on the inadequacy of the pleadings; or, as in *Ex parte Virginia*, the applicability of the statute upon a finding that the actions of a state judge constituted state action. The Supreme Court, a year before, in *United States v. Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290 (1883), had held unconstitutional another Act of Congress. Federal authorities had indicted twenty defendants in Tennessee for seizing and beating four prisoners, killing

one, while the prisoners were in the hands of state police officers. The federal government sought to convict these persons for violating a Congressional enactment that read in part:

> "If two or more persons in any State or Territory conspire or go in disguise upon the highway or on the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws, each of said persons shall be punished. . ." 106 U.S. at 632.

In this case, the Court disposed of the argument concerning the Fifteenth Amendment:

> "It requires no argument to show that such a law cannot be founded on a clause of the Constitution whose sole object is to protect from denial or abridgment, by the United States or States, on account of race, color, or previous condition of servitude, the rights of citizens of the United States to vote." 106 U.S. at 637.

Moving to a consideration of the Fourteenth Amendment, the Court, relying on language from *United States v. Cruikshank* and *Virginia v. Rives*, found no "state action," and concluded:

> "As, therefore, the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers, we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution." 106 U.S. at 640.

The Court next considered the argument that the statute was valid under the Thirteenth Amendment, and rejected that contention, defining that amendment as having "simply abolished slavery and involuntary servitude. . ." 106 U.S. at 643.

The Court finally referred to a passage in the body of the Constitution, Section 2, of Article 4 that declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several states." The Court said:

> "But this section, like the Fourteenth Amendment, is directed against State action... It was never supposed that the section under consideration conferred on Congress the power to enact a law which would punish a private citizen for an invasion of the rights of his fellow citizen, conferred by the State of which they were both residents, on all citizens alike." 106 U.S. at 643, 644.

The Supreme Court concluded as to the case that the Act of Congress was unconstitutional and that the indictments must fail. Mr. Justice Harlan dissented without opinion on the question of jurisdiction without reaching the constitutional points.

Baldwin v. Franks

Four years later the same statute involved in *United States v. Harris* was again urged to sustain prosecutions by federal authorities. *Baldwin v. Franks*, 120 U.S. 678, 7 S.Ct. 656, 30 L.Ed. 766 (1887). Several persons had allegedly conspired against some Chinese in a California town and had run them out of the community. The federal government arrested those persons, who, in turn, sought their freedom by writ of habeas corpus. The government argued before the Supreme Court that the United States had entered into a treaty with China agreeing to provide Chinese aliens with the same "rights, privileges, immunities, and exemptions as may be enjoyed by the Citizens or subjects of the most favored nation, and to which they are entitled by treaty." 120 U.S. at 683. The argument continued that although the Act of Congress had been declared unconstitutional in *United States v. Harris*, "[I]t is good for the punishment of those who conspire to deprive aliens of the rights guaranteed to them in a state, by the treaty of the United States." 120 U.S. at 685. The Supreme Court did not find that the statute was separable so as to give effect to its general meaning, declined to distinguish *United States v. Harris*, and held that the statute could not sustain prosecutions against private action.

As an alternative, the federal prosecuting officials urged that another statute, which the Supreme Court had earlier declared constitutional in *Ex parte Yarbrough* (discussed below), would sustain the prosecution in the *Baldwin* case. The Supreme Court held, however, that since this latter statute was penal in character, it must be strictly construed, and that the word "citizen", used by the statute to characterize the persons to be protected, could not be extended

to include mere inhabitants, as were these Chinese.

The Supreme Court had upheld the constitutionality of the last-mentioned statute several years earlier in *Ex parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884). In brief, that statute provided punishment for persons conspiring to deprive "any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." Another statute punished conspirators seeking to deprive persons of the right to vote in federal elections. The offense charged in the *Yarbrough* case was that "the defendants conspired to intimidate . . . a citizen of African descent, in the exercise of his right to vote for a member of the Congress of the United States . . ." 110 U.S. at 657. By refusing habeas corpus the Supreme Court in the *Yarbrough* decision permitted the convictions to stand, notwithstanding the absence of "state action." The Court not relying on the Fourteenth or Fifteenth Amendment upheld the statute under Section 4 of Article 1 of the Constitution and said:

> "The reference to cases in this court in which the power of Congress under the first section of the Fourteenth Amendment has been held to relate alone to acts done under State authority, can afford petitioners no aid in the present case. For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a State, or which are not committed by anyone exercising its authority, are not within the scope of that amendment, it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself." 110 U.S. at 666.

It is clear that *Yarbrough* distinguishes the federal rights of a citizen which Congress can protect against individual action from rights which can only be protected against "state action."

In *Baldwin v. Franks*, a majority of the Supreme Court held that the statute, although constitutional in appropriate factual situations such as appeared in the *Yarbrough* case, could not be extended to aliens. The Court declared still another statute, which provided for penalties against those seeking to overthrow or levy war against the government, inapplicable to the facts of the case. Mr. Justice Harlan dissented on the grounds that the statute upheld in *Yarbrough* included Chinese aliens and not only citizens, and that these Chinese had been deprived of a right which Congress could protect. Mr. Justice Field also dissented, but on the ground that the statute authorizing punishment for those conspiring to wage war against the government included behavior designed to hinder the enforcement of treaty agreements.

Hodges v. United States

In *Hodges v. United States*, 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65 (1906), federal authorities brought indictments against defendants alleging that they had conspired to intimidate Negro laborers from working in a manufacturing establishment with the result that the Negro workmen broke their contracts with their employers and left. The Civil Rights Acts, heretofore reviewed, were raised as statutory authority to punish the defendants. The Supreme Court did not allow the indictments to stand. It found that the facts did not fall within the protection of the Thirteenth Amendment against slavery; and as to the Fourteenth and Fifteenth Amendments, the Court stated:

> ". . . they, as repeatedly held, are restrictions upon state action, and no action on the part of the state is complained of." 203 U.S. at 14.

Justices Harlan and Day dissented on the basis that the right to contract is a right of citizens of the United States which Congress can protect against individual or state action.

United States v. Wheeler

The Supreme Court thus has continued to deny to Congress the right to enforce the Fourteenth and Fifteenth Amendments except in situations involving state action. In 1920, in *United States v. Wheeler*, 254 U.S. 281, 41 S.Ct. 133, 65 L.Ed. 270, a case again involved the statute providing punishment for those who conspire to deprive citizens of rights or privileges secured to them by the Constitution or laws of the United States. Twenty-five persons were indicted for forcibly deporting other persons from Arizona to New Mexico. The indictments were quashed in the lower federal court, and the Supreme Court upheld the quashing of the indictments, since no state action was involved. The government in seeking to sustain the indictments had relied on Article IV, Sec. 2 of the

Constitution, which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. The Court referred to *United States v. Harris* and repeated "that the second section of Article IV, like the Fourteenth Amendment, is directed alone against state action." 254 U.S. at 298.

The Supreme Court has continued to state that the Fourteenth and Fifteenth Amendments do not embrace individual action, but only such action as can be described as state action. In *Corrigan v. Buckley*, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969 (1926), the Court restated its interpretation of the Fourteenth Amendment as "having reference to state action exclusively, and not to any action of private individuals." 271 U.S. at 330. And the Court held that the Fifth Amendment, which, rather than the Fourteenth, is applicable in the District of Columbia, "is a limitation only upon the powers of the general government . . . and is not directed against the action of individuals." The clearest recent pronouncement of this general proposition was made in 1948 by Mr. Chief Justice Vinson, who said for a unanimous court in *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), that:

> ". . . the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the State." 334 U.S. at 13. See also *Collins v. Hardyman*, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253 (1951).

II. State Action Includes Action of Any Agency of the State and Any Level of Government

Although the Supreme Court has consistently spoken of the distinction between purely individual action and state action, some of the foregoing cases and others are equally clear in asserting that the actions of persons acting as agents of the state constitute state action. In *Virginia v. Rives*, previously discussed, the Court broadly defined state action to include the legislative, executive, and judicial authorities. See also *Chicago, B.&Q.R.R. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). And with particular reference to the systematic exclusion of Negroes from jury duty, the Court in *Carter v. Texas*, 177 U.S. 442, 20 S.Ct. 687, 44 L.Ed. 839 (1900) said:

> "Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment to the Constitution of the United States." 177 U.S. at 447.

III. State Action Includes Acts of Any Executive Officer

The Supreme Court in addition to defining state action in broad terms to include the acts of the officers of the three branches of government, has decided cases in which it applied the Fourteenth Amendment to curtail specific acts of state executive officers. In *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1907), the Supreme Court held that a federal court could by injunction restrain state executive officers from enforcing a state railroad rate statute that was unconstitutional and that a federal judge could fine and commit for contempt the Attorney General of Minnesota upon his refusal to obey the injunction. The Supreme Court faced the problem of allowing persons to sue state officers in federal courts to protect constitutional rights notwithstanding the prohibition of the Eleventh Amendment, which denies judicial power to the federal government in suits brought by persons against a state. Whatever logical difficulties may be present in the result, it is clear now that the federal courts can protect the constitutional rights of persons as established by the Fourteenth and Fifteenth Amendments in instances where the unconstitutional action is committed by state officers. Indeed, it is frequently the fact that a state officer has inflicted the injury that permits the federal courts to apply the two Amendments, since otherwise there might be no showing of state action upon which to invoke the Amendments. Other examples of state action, arising

from the acts of state executive officers would include *Sterling v. Constantin*, 287 U.S. 378, 53 S.Ct. 190, 77 L.Ed. 375 (1932). In that case, a unanimous Court through Mr. Chief Justice Hughes upheld a District Court that had granted an injunction against the Governor of Texas whose "orders were an invasion under color of state law of rights secured by the Federal Constitution . . ." 287 U.S. at 404. In that case, the governor had ordered state troops to enforce state regulations limiting the production of oil. These regulations had been adjudged confiscatory and unconstitutional by a federal court. In *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935), the Court denied a petitioner permission to file a writ of habeas corpus in the federal courts prior to an exhaustion of state remedies. Nevertheless the Court said with reference to perjured testimony used by state prosecuting attorneys to secure the conviction of the accused:

> "[T]he action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, through its courts, or through its executive or administrative officers." 294 U.S. at 113.

IV. State Action Includes Acts of Any Member of the State Judiciary

The Supreme Court early applied the principle that acts of a judge of the state constitute state action. *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676 (1880), previously discussed. The Supreme Court found state action when a Virginia state judge, in violation of the Civil Rights Acts, excluded Negroes from state juries. And in *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947), the Supreme Court reversed a conviction of a newspaperman for contempt of court, on the basis that such judicial action constituted state action violative of the Fourteenth Amendment.

Shelley v. Kraemer

A fairly recent and more complicated problem involving the characterization of judicial action as state action within the meaning of the Fourteenth Amendment arose in *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). The Supreme Court consolidated two cases, one from Missouri and one from Michigan, for its opinion. In the Missouri case, thirty owners of property had agreed to restrict for fifty years its use "by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purposes by people of the Negro or Mongolian Race." 334 U.S. at 5. Notwithstanding this agreement, Negroes obtained a warranty deed to a parcel of the property with the result that owners of other parcels subject to the agreement brought suit in the state courts of Missouri to restrain the Negroes from taking title to the property. The Supreme Court of Missouri directed the trial court to enforce the agreement and found that the restrictive covenant, if enforced, would not violate the rights of the Negro purchasers as guaranteed by the Federal Constitution. The Supreme Court of the United States reversed the Supreme Court of Missouri and held that it is state action violative of the Equal Protection Clause of the Fourteenth Amendment for a state court to enforce a racially restrictive covenant.

Prior to the *Shelley* case, the state courts had generally enforced such covenants relying on such earlier decisions as the *Civil Rights Cases* that exempted private action from the reach of the Fourteenth Amendment. See e.g. *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1915); *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 186 A. 596 (1920). But see *Gandolfo v. Hartman*, 49 F. 181 (C.C.S.D.Cal. 1892).

Corrigan v. Buckley

Further, in 1926, the Supreme Court, in *Corrigan v. Buckley*, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969, had dismissed for want of jurisdiction an appeal from the Court of Appeals of the District of Columbia that involved a similar restrictive covenant. This opinion had seemed to support the traditional view of the state courts that since these restrictive agreements grew out of private contracts, they could be enforced for want of state action. The plaintiffs in the *Corrigan* case had sought in the District Court for the District for Columbia to prevent the defendant from conveying a lot to a Negro and to

prevent the Negro from taking possession of the lot. The plaintiffs relied on the contract entered into by landowners that "no part of these properties should ever be used or occupied by, or sold, leased or given to, any person of the Negro race or blood; and that this covenant should run with the land and bind respective heirs and assigns for twenty-one years from and after its date." 323 U.S. at 327. The defendant moved to dismiss the suit that had been brought against him on the ground that the restrictive covenant violated the Constitution. Both the District Court and the Court of Appeals agreed that the motions to dismiss should be overruled, and refused to dismiss the suit. The defendant then took an appeal to the Supreme Court of the United States.

In an opinion by Mr. Justice Sanford, the Supreme Court dismissed the appeal for want of jurisdiction, not finding a substantial constitutional or statutory question. The opinion, however, cited *Virginia v. Rives*, *United States v. Harris*, and the *Civil Rights Cases*, all previously discussed, for the proposition that the Fourteenth Amendment does not have reference to any action of private individuals, and drew a similar conclusion as to the Fifth Amendment, which limits the powers of the federal government. With regard to the Fifth, Thirteenth, and Fourteenth Amendments, the Court said:

> "It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void." 271 U.S. at 330.

Therefore, in *Shelley v. Kraemer*, the defendants placed considerable reliance on the *Corrigan v. Buckley* decision of some twenty years earlier. Chief Justice Vinson however, in his opinion in the *Shelley* case distinguished the *Corrigan* decision and found it inapplicable to the situation in *Shelley:*

> "The only constitutional issue which the appellants had raised in the lower courts, and hence the only constitutional issue before the Court on appeal, was the validity of the covenant agreements as such. This Court concluded that since the inhibitions of the constitutional provisions invoked apply only to governmental action, as contrasted to action of private individuals, there was no showing that the covenants, which were simply agreements between private property owners, were invalid. . . Nothing in the opinion of this Court, therefore, may properly be regarded as an adjudication on the merits of the constitutional issues presented by these cases, which raise the question of the validity, not of the private agreements as such, but of the judicial enforcement of those agreements." 334 U.S. at 9.

The Court then reaffirmed the principle of the *Civil Rights Cases* by saying that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful," 334 U.S. at 13, and concluded that restrictive covenants, if voluntarily enforced, do not violate the Fourteenth Amendment for lack of state action.

The Court found, however, that the enforcement by the courts of these agreements constitutes state action that violates the Equal Protection Clause of the Fourteenth Amendment.

> "The judicial action . . . bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment refers to exertions of state power in all forms, and when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of the Court to enforce the constitutional commands." 334 U.S. at 20.

The same day, the Court ruled in *Hurd v. Hodge*, 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187 (1948) that similar restrictive covenants are unenforceable in the District of Columbia by virtue of the Fifth Amendment.

Barrows v. Jackson

In connection with restrictive covenants, the Court apparently extended the scope of state action in *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 91 L.Ed. 1586 (1953), another opinion that consolidated several cases. Various plaintiffs had sued defendants for breaches of contract in that the defendants had broken the restrictive covenant by allowing Negroes to use

the property. Mr. Justice Minton in writing the majority opinion said:

> "The next question to emerge is whether the state action in allowing damages deprives anyone of rights protected by the Constitution. If a state court awards damages for breach of a restrictive covenant, a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur. Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians. Denial of this right by state action deprives such non-Caucasians, unidentified but identifiable, of equal protection of the laws in violation of the Fourteenth Amendment."

The Court held that these damage suits could not be entertained by the courts. Mr. Chief Justice Vinson, the author of the *Shelley* opinion, dissented and said:

> "But even if the merits are to be reached, even if we must decide whether enforcement of this covenant in a lawsuit of this kind is state action which contravenes the Fourteenth Amendment, I think that the absence of any direct injury to any identifiable non-Caucasian is decisive. The *Shelley* case, resting on the express determination that restrictive covenants are valid between the parties, dealt only with a state court's attempt to enforce them directly against innocent third parties whose right to enjoy their property would suffer immediate harm. . . In this case, the plaintiffs have not sought such relief. . . In [Shelley], the state court had directed 'the full coercive power of government' against the Negro petitioners—forcefully removing them from their property because they fell in a class discriminatorily defined. But in this case, where no identifiable third person can be directly injured if respondent is made to disgorge enough to indemnify petitioners, the Court should not undertake to hold that the Fourteenth Amendment stands as a bar to the state court's enforcement of its contract law." 346 U.S. at 267, 268.

Two state appellate courts have somewhat differed in their application of the principles set down by the United States Supreme Court. A 1949 Texas decision, *Clifton v. Puente*, Tex. Civ. App., 218 S.W.2d 272, involved a dispute over title to land. The land was presently held by an American citizen of Mexican descent; but an earlier deed through which he derived the title contained a number of restrictive covenants, including one that prohibited the sale of the property to anyone of Mexican descent. The deed that set forth these restrictive terms provided that in case the agreement should be broken the title and possession of the property should be forfeited and surrendered to the seller, or his heirs, administrators, successors, or assigns. The trial court refused to enforce this covenant against the Mexican-descended holder of the property on the authority of *Shelley v. Kraemer;* and the Texas Court of Civil Appeals affirmed the judgment of the lower court.

Charlotte Park Case

In a recent North Carolina case, *Charlotte Park and Recreation Commission v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), 1 Race Rel. L. Rep. 164 (1956), cert. denied, 76 S.Ct. 469 (1956), the state supreme court construed a deed for purposes of a declaratory judgment. A municipal corporation owned land which it used for public recreational purposes. The deed, however, contained a restriction upon the use of the land, including a provision that it should "be used and enjoyed by persons of the white race only." The deed went on to provide that in the event the land should not be used by white persons only, it should revert to "the grantor of the land, his heirs or assigns." The municipal corporation sought to determine its rights to permit Negroes to use the recreational center in view of the recent cases from the Supreme Court of the United States forbidding segregation in public recreational facilities. See *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed._____(1955), affirming, 220 F.2d 386 (1955), 1 Race Rel. L. Rep. 15, 162 (1956). The Supreme Court of North Carolina characterized the restriction in the deed, not as a covenant, but as creating a determinable fee in the municipal corporation with a reversion in the grantor that would automatically arise to revest the property in the grantor upon breach of the restrictions in the deed. The Court said:

> "The operation of this reversion provision is not by any judicial enforcement by the State Courts of North Carolina and *Shelley v. Kraemer* . . . has no application."

The Court concluded that since the restriction was a "reversion" rather than a "covenant", the property would, upon use by Negroes, be lost to the City and be owned by the grantor, or those deriving title from him.

Rice v. Sioux City Cemetery

The latest opinion from the United States Supreme Court related to the judicial enforcement of racial restrictions on the use of land is *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955), 1 Race Rel. Law Rep. 15 (1956.) A plaintiff, by contract, bought a burial lot from a cemetery, the defendant. The contract of sale provided that "burial privileges accrue only to members of the Caucasian race." Following the funeral services conducted at the grave site, the cemetery refused to bury plaintiff's husband, the deceased, who was a Winnebago Indian. In an action for damages brought by the plaintiff against the cemetery in the Iowa state courts, the Iowa Supreme Court ruled that although the restrictive clause was unenforceable, it could be relied upon as a defense in an action for damages. The United States Supreme Court granted certiorari and affirmed the Iowa Supreme Court by an equally divided vote and without opinion. Upon rehearing, the United States Supreme Court, with three dissenters, vacated its prior order and dismissed the writ of certiorari as improvidently granted, since the case was no longer in Iowa of importance as precedent, the Iowa legislature having declared such clauses invalid under state law. The opinion of the Court has the following pertinent language by Mr. Justice Frankfurter:

> "Only if a State deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment can its protection be invoked. . . Such a claim involves the threshold problem whether in the circumstances of this case, what Iowa, through its courts, did amounted to 'state action'. This is a complicated problem which for long has divided opinion in this Court." 349 U.S. at 72.

Since the Court denied certiorari, it did not decide whether the admission by a state court of a discriminatory clause in a contract as a defense to an action for damages constitutes state action.

Lunacy Proceedings

Several cases have arisen in which plaintiffs sought to set aside or attack state lunacy proceedings on the grounds that the courts or the persons bringing about the proceedings acted under state law in violation of the Constitution. In *Wilcox v. Horan*, 178 F.2d 162 (10th Cir. 1949), the Court of Appeals affirmed the dismissal by the District Court of a complaint based on an alleged abridgment of constitutional rights under the Fourteenth Amendment. The action was brought for the plaintiff by her son asserting the illegal detention of the plaintiff by her daughter. The complaint further asserted that state action was involved, since the lunacy proceedings held in a county court resulted in the daughter's obtaining custody of her mother, with the result that the daughter was an agent of the state. The Court disposed of the matter in these words:

> "The assertion that a guardian or custodian of the person of an incompetent, appointed by a county court having jurisdiction of such matters, is an agent or representative of the state is not supported by any authority. While we may very much doubt that respondent is a state officer as that term is ordinarily understood, we feel quite certain that her acts are not to be deemed 'state action' within the contemplation of the Fourteenth Amendment." 178 F.2d at 165.

Another Court of Appeals held in *Whittington v. Johnson*, 201 F.2d 810 (5th Cir. 1953) that the Civil Rights Acts do not extend to "secure a person against unfounded or malicious lunacy proceedings. If the facts here involved make out a case of false arrest or malicious prosecution, the redress of such wrong is left with the states." 201 F.2d at 812. One judge dissented. It is noteworthy that in this case no allegations were made that the persons causing plaintiff to be confined were state agents. The Fourteenth Amendment was involved in view of the fact that the commitment resulted from a judgment of a state court.

Similar attacks have been launched unsuccessfully against state probate proceedings. The Massachusetts Supreme Court in *Gordon v. Gordon*, 124 N.E.2d 228 (Mass. 1955) cert. denied 349 U.S. 947, 75 S.Ct. 875, 99 L.Ed. 1272 (1955) affirmed a decree of a probate court that had the effect of enforcing a restriction in a will against the validity of any gift to a child who should marry any person not of the Hebrew faith. *Shelley v. Kraemer* was distinguished, as involving "quite different considerations from the right to dispose of property by will." 124 N.E.2d at 235. An Oregon court reached a similar result in *United States National Bank v. Snodgrass*, 202 Ore. 530, 275 P.2d 860 (1954).

These latter cases point up the necessary

distinction between what constitutes state action from the question that assuming state action, what state action is valid action. Or as put by Mr. Justice Frankfurter in *Rice v. Sioux City Memorial Park Cemetery:*

> "Were this hurdle [state action] cleared, the ultimate substantive question, whether in the circumstances of this case the action complained of was condemned by the Fourteenth Amendment, would in turn present no easy constitutional problem." 349 U.S. at 72.

For example, though state action was clearly involved, the Supreme Court has held that it is not unconstitutional state action for a state court to misconstrue state law in the sense of mistaken judgment, *Enterprise Irrigation Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 37 S.Ct. 318, 61 L.Ed. 644 (1917), or to render a decision without precedent, *American Ry. & Express Co. v. Kentucky*, 273 U.S. 269, 47 S.Ct. 353, 71 L.Ed. 639 (1927).

V. State Action Includes Legislative Enactments

As early as 1880 the Supreme Court invalidated a state statute as unconstitutional state action that violated the Fourteenth Amendment. *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880). In that case, the Court held that a West Virginia statute providing that only white persons could serve as jurors deprived a Negro defendant of the equal protection of the laws. Other familiar examples of unconstitutional state statutes violating the Fourteenth Amendment would include *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80. L.Ed. 660 (1936), in which the Supreme Court invalidated a statute that imposed a tax on newspapers with the effect of curtailing freedom of the press, and *Burstyn v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), in which the Court struck down a New York statute that permitted movie censorship.

Several of the significant opinions eliminating racial discrimination in elections involved state statutes that denied equal voting rights to Negroes. Other cases involving elections, however, concerned private or quasi-private devices to deny racial groups the right to vote. These latter cases are discussed elsewhere, since they did not involve discriminatory state statutes. It will be observed, however, that the power of Congress to regulate Congressional elections under Sections 2 and 4 of Article I of the Constitution permits Congressional statutes, such as the Civil Rights Acts, when limited to congressional elections, to reach purely individual behavior, as well as discriminatory state action. In such cases, the discriminatory action is prohibited by the application of these sections of Article I rather than the Fourteenth or the Fifteenth Amendments. See e.g. *Ex parte Siebold*, 100 U.S. 371, 23 L.Ed. 717 (1880); *Ex parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884); *U.S. v Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915). But see *James v. Bowman*, 190 U.S. 127, 47 L.Ed. 979, 23 S.Ct. 678 (1903). This proposition that Congress can regulate federal elections to eliminate both state and indiivdual action when involving discrimination was clearly stated in *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). The Court through Mr. Justice Stone said: ". . . Unlike those [rights] guaranteed by the Fourteenth and Fifteenth Amendments [the right to vote in elections for Congressional office] is secured against the action of individuals as well as of state." The Court went on to define an election as including state primaries. See also *United States v. Saylor*, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341 (1944).

The Court's power to regulate all elections that might involve discriminatory practices, whether involving federal offices or not, was discussed in *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927). The Court, through Mr. Justice Holmes, allowed an action for damages brought by a Negro against the Texas Judges of Elections, a state agency, for denying him the right to participate in the Democratic primary. The claim rested on an assertion that this was state action that violated the Fourteenth and Fifteenth Amendments. The Court, finding state action, based the decision on the Fourteenth. Earlier the Court had invalidated an amendment to the Oklahoma Constitution that included a grandfather clause, which exempted from a literacy test those voters who could vote prior to January 1, 1866, or who were direct descendants from persons who voted at that time. *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915). More recently the

Court struck down, as violative of the Fifteenth Amendment, a substituted but discriminatory statutory scheme that in effect placed a burden on Negro voters that did not encumber white persons. *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939). Last year a third Oklahoma situation arose in *McDonald v. Key*, 224 F.2d 608 (10th Cir. 1955). A complainant brought an action for damages against the members of the Oklahoma State Election Board for placing the word Negro after his name on the primary ballot used in electing the nominee for the office of United States Senator. The Court of Appeals reversed the District Court and held that the Oklahoma law requiring only Negroes to have their race printed on the ballot violated the Equal Protection Clause of the Fourteenth Amendment. This case is reprinted in 1 Race Rel. L. Rep. 207 (1956).

VI. State Action Includes Municipal Ordinances

It is well established that the application of municipal ordinances and regulations constitute state action within the meaning of the Fourteenth and Fifteenth Amendments. *Lovell v. City of Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938) (Ordinances violated freedom of press); *Dobbins v. Los Angeles*, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169 (1904) (Ordinances had effect of taking property without compensation). *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510 (1912) (Municipal regulation established confiscatory telephone rates.)

Of special significance in the field of race relations is *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917), which held invalid a municipal ordinance of Louisville, Kentucky, that prohibited the sale of property by a white man to a Negro or by a Negro to a white man if the majority of residences on the lot were occupied by a different race from the buyer. The Court, through Mr. Justice Day, unanimously found that this action on the part of the city violated the right of individuals to dispose of their own property, a right protected by the Due Process Clause of the Fourteenth Amendment. The Court invalidated similar ordinances in *Harmon v. Tyler*, 273 U.S. 668, 47 S.Ct. 471, 71 L.Ed. 831 (1927) and *Richmond v. Deans*, 281 U.S. 704, 50 S.Ct. 407, 74 L.Ed. 1128 (1930). This type of municipal ordinances is uniformly considered state action of an unconstitutional nature. As already noted, the enforcement by the Courts of similar private agreements constitutes invalid state action, see *Shelley v. Kraemer*, previously discussed.

VII. State Action Includes Valid Laws Improperly Enforced

Unlike the situation in *Strauder v. West Virginia* in which a West Virginia statute discriminated on its face against Negroes, Delaware had a statute ostensibly fair and construed by Delaware courts to be non-discriminatory. Nevertheless, the Supreme Court of the United States, in *Neal v. Delaware*, 103 U.S. 370, 26 L.Ed. 567 (1880), reversed the conviction of a Negro upon a showing that jury commissioners, in fact, excluded Negroes; such exclusion was state action. Similarly, in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), the Supreme Court invalidated a municipal ordinance that on its face validly regulated laundries but that in its enforcement discriminated against Chinese.

In *Gundling v. Chicago*, 177 U.S. 183, 20 S.Ct. 633, 44 L.Ed. 725 (1899), a plaintiff, relying chiefly on *Yick Wo v. Hopkins*, alleged that a city ordinance as applied to him violated his constitutional rights in granting to the mayor a discretion in the issuance of licenses to sell cigarettes. The Court found that the statute was neither arbitrary in its nature nor discriminatory in its application. And in *Torrence v. Florida*, 188 U.S. 519, 23 S.Ct. 402, 47 L.Ed. 572 (1903), the Court held that mere affidavits from Negro complainants that to their best knowledge, information, and belief Negroes were excluded from grand and petit jury duty in a county did not constitute the proof necessary to indicate the systematic exclusion prohibited by the Constitution. See also *Ah Sin v. Wittman*, 198 U.S. 500, 25 S.Ct. 756, 49 L.Ed. 1142 (1905) (inadequate proof that a gambling ordinance was improperly administered against petitioners).

VIII. State Action Includes Acts of State Officers Contrary to State Law

The problem has frequently arisen requiring the Court to decide whether the behavior of a state official constitutes state action within the prohibition of the Fourteenth or Fifteenth Amendments, if the officials are acting in disobedience to state law rather than as agents enforcing state law. Important collaterally in the particular case, but not directly within the scope of this Study, is whether the lower federal courts have jurisdiction to decide the constitutional issue, or whether the plaintiff claiming discrimination should first seek relief through the state courts. Although the Supreme Court generally holds that acts by state officials, whether sanctioned or forbidden, are state action, a review of the main cases leading to this conclusion follows:

Barney v. City of New York

In the relatively early case of *Barney v. City of New York*, 193 U.S. 430, 24 S.Ct. 502, 48 L.Ed. 737 (1904), a complainant sought in a federal court to enjoin the city of New York from proceeding with the construction of a municipal railroad. The complainant contended that the city and its agency, the Board of Rapid Transit Commissioners, were depriving him of easements and property rights without just compensation, in violation of the due process clause of the Fourteenth Amendment. The bill, however, alleged that the activities complained of were not authorized by the New York legislature but were actually forbidden by it. The Supreme Court of the United States sustained the dismissal of the suit, finding that since the state had not authorized the alleged deprivations to complainant's rights, the case did not fall within the protection of the Fourteenth Amendment against state action. The *Barney* case was followed a year later in *Savannah Ry. v. Savannah*, 198 U.S. 392, 25 S.Ct. 690, 49 L.Ed. 1097 (1905), and subsequently in a number of lower federal court opinions, primarily involving property rights rather than civil rights. See cases cited in Isseks, *Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials*, 40 Harv. L. Rev. 969 (1927).'

However, in a suit to enjoin state officials from collecting taxes as unconstitutionally assessed, the Supreme Court held that action by official boards constitutes state action. *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20, 28 S.Ct. 7, 52 L.Ed. 78 (1907). Mr. Justice Holmes, dissenting, said:

> ". . . [T]he action of the state board . . . should not be held to be the action of the state until, at least, it has been sanctioned directly . . . by the first tribunal of the State, the Supreme Court." 207 U.S. at 41.

Mr. Justice Holmes relied on the *Barney* case; but the majority distinguished *Barney* by saying it "holds that where the act complained of was forbidden by the state legislature, it should not be said to be the act of the State. Such is not the case here." 207 U.S. at 37. Again, in *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510 (1913) a plaintiff sought to enjoin the application of allegedly confiscatory rates of a telephone company. The Supreme Court ruled that the lower federal court had jurisdiction under the Fourteenth Amendment.

In *Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265 (1931), the Court departed from the *Barney* case in these words by Mr. Justice Brandeis:

> "When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the federal constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of the state law." 284 U.S. at 246.

The *Barney* case was distinguished, since in *Iowa-Des Moines Bank* the state courts had considered the problem.

In 1944, however, Mr. Justice Frankfurter, concurring in *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944) hinged his concurrence on the *Barney* doctrine. The petitioner had brought an action for damages under the Civil Rights Acts alleging that election officials infringed his constitutional rights by wilfully, maliciously, and arbitrarily refusing to file a correct certificate showing that he was a Republican nominee for office. Mr. Justice Frankfurter stated that since the act of the petitioner had not been approved by the state supreme court, the United States Supreme Court should not characterize the actions of the election officials as state action. The majority opinion by Mr. Chief Justice Stone, found that the alleged action did not violate a constitutional right and of *Barney* said, "The authority of [it]

on which the Court below relied, has been so restricted by our later decisions, that our determination may be more properly and more certainly rested on petitioner's failure to assert a right of a nature such as the Fourteenth Amendment protects against State action." 321 U.S. at 13.

Screws v. United States

A year after the *Snowden* case, the *Barney* doctrine was again involved, but this time in a criminal proceeding in federal court under the Civil Rights Acts. A sheriff in violation of his duties under state law, beat a prisoner who later died of his wounds. *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945). The sheriff, Screws, was convicted in a federal district court. The Supreme Court did not form a majority for an opinion, but six members agreed that the action of the sheriff was under color of law and thus state action, whether sanctioned or not by the state. Three other Justices, in an opinion by Mr. Justice Roberts, assumed for the purpose of the *Screws* case, that "Congress could, within the bounds of the Fourteenth Amendment, treat action taken by a state official even though in defiance of State law and not condoned by ultimate State authority as the action of 'a state.'" 325 U.S. at 147. These same Justices pointed out, however, that the *Barney* case, which rules otherwise, has never been overruled.

Since the *Screws* case, there is no doubt that officials who misuse their authority can be tried under Congressional statutes, and that the acts of these officials constitute state action. *Williams v. United States*, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774 (1951). See also *Crews v. United States* 160 F.2d 746 (5th Cir. 1947). *Apodaca v. United States* 188 F.2d 932 (10th Cir. 1951). Of course the Civil Rights Acts do not always reach the offense of the accused, *United States v. Williams*, 341 U.S. 70, 71 S.Ct. 581, 95 L.Ed. 758 (1951), or indictments fail for infirmities in the pleadings or trial. Cf. *Pullen v. United States*, 164 F.2d 756 (5th Cir. 1947).

In *Valle v. Stengel*, for example, 176 F.2d 697 (3rd Cir. 1949), a plaintiff successfully brought action under the Civil Rights Acts against a policeman who assisted private persons in excluding Negroes from a privately-owned recreation center. The opinion, buttressed by a finding that such exclusion violated state law, does not demarcate the liabilities of the private corporation and its agents, but reaches only the issue that the action of the policeman was state action.

In *Whiteside v. Southern Bus Lines*, 177 F.2d 949 (6th Cir. 1949) a Negro sued a bus company, engaged in interstate commerce, for damages resulting to her when the bus attendant, aided by a state police officer, ejected her from the bus upon her refusal to accept a proffered seat in the rear of the bus. The court held that the rule of the bus company requiring segregation in buses constituted an undue burden on interstate commerce, even in the absence of a mandatory state statute requiring segregation. The court recognized explicitly that acts burdening interstate commerce are not "like those inhibited in the Fourteenth Amendment, limited to state action." But the court went on to find state action in the ejection of the Negro through the aid of a state police officer. The opinion also suggests that Kentucky might have been said to sanction such practices, not in view of a statute but because of language from a Kentucky decision, as follows: "A common carrier of passengers for hire has the right, in the absence of statute, to prescribe regulations for the separation of white and colored passengers, giving equal and like protection and accommodation to both." *Brumfield v. Consolidated Coach Corp.* 240 Ky. 1, 40 S.W.2d 356, 365 (1931). Thus, toleration of discrimination smacks of state action.

Whether a public officer employed by a private company is action under color of state law arose in *Watkins v. Oaklawn Jockey Club*, 183 F.2d 440 (8th Cir. 1950). A plaintiff brought an action for damages against a jockey club, alleging that the club had caused him to be ejected in violation of the Fourteenth Amendment. In this situation, the court found that although the jockey club had employed a sheriff and a deputy to eject the plaintiff, these officers were not acting under color of Arkansas law but rather as private agents of the club. The Court of Appeals affirmed the District Court's dismissal of the suit:

> "It is well established that the protection provided by the Fourteenth Amendment to the Constitution is against the acts of the States only. It does not apply to the acts of individuals." 183 F.2d at 442.

Even though the acts of officials of the state

may constitute state action, the nature of the action may not be such as to violate the Fourteenth or Fifteenth Amendments. As mentioned, *Snowden v. Hughes* held that even though the action was state action, it was not of such scope as to bring it within the Fourteenth Amendment. This point was perhaps put most succinctly by Mr. Justice Douglas in his dissent:

> "I also agree that a candidate for public office is not denied the equal protection of the law in the constitutional sense merely because he is the victim of unlawful administration of a state election law. I believe, as the opinion of the Court indicates, that a denial of equal protection of the laws requires an invidious purposeful discrimination." 321 U.S. at 18.

In *Standard Computing Scale Co. v. Farrell*, 249 U.S. 571, 39 S.Ct. 380, 63 L.Ed. 780 (1919), the Supreme Court sustained the dismissal of a suit brought by a manufacturer against the State Superintendent of Weights and Measures in New York. The manufacturer sought to enjoin the enforcement of certain specifications issued by the Superintendent that caused the manufacturer's product to diminish in trade. Mr. Justice Brandeis for a unanimous Court found that the specifications were not in the nature of a law or regulation and that the prohibitions of the federal constitution were not applicable.

And in *Haymon v. Galveston*, 273 U.S. 414, 47 S.Ct. 363, 71 L.Ed. 714 (1927) a unanimous Court through Mr. Justice Stone denied relief to an osteopathic physician who was refused permission by the members of the board of a city hospital to practice in the hospital. The Court found no discrimination worthy of constitutional significance.

In *Mason v. Hitchcock*, 108 F.2d 134 (1st Cir. 1939) a plaintiff brought an action for damages against the Massachusetts Bar Examiners claiming that they had conspired to deprive him of the right to practice law and had arbitrarily refused to recommend him for admission to the Bar. The Court dismissed the action as not properly within the Fourteenth Amendment and said, "This action cannot be considered other than one against individuals and the Fourteenth Amendment has no application." 108 F.2d at 135.

IX. State Action May Include Private Action That Results From Mandatory State Statutes

In the *Shelley* case, previously considered, the Court defined state action as referring to "exertion of state power in all forms." 334 U.S. at 20, and went on to forbid the judicial enforcement of private agreements that discriminated on the basis of race. The earlier decision of *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915) presented a converse situation: a state statute required discrimination by private persons who did not wish to comply with its mandate. In that case a federal district judge issued a restraining order against Arizona officers forbidding them to administer a state law against Truax, an employer, to require him to fire Raich, an employee, solely because of the statute that prohibited employers of five or more workers from hiring less than eighty per cent of them from qualified electors or native-born citizens of the United States. The Supreme Court invalidated the law as violative of the Fourteenth Amendment. The case permits of differing interpretations. It may be considered as merely restraining state officers from enforcing an invalid state statute, a familiar enough concept. Significantly, however, the case seems to suggest that, as put by the minority in a more recent New York case, ". . . a private individual who practices discrimination under the constraint of state power violated the equal protection clause." *Dorsey v. Stuyvesant Town Corporation*, 299 N.Y. 512, 87 N.E.2d 541, 554 (1949).

Of analogous import with *Truax* is *Flemming v. South Carolina Electric and Gas Company*, 224 F.2d 752 (4th Cir. 1955). There the Court of Appeals in a per curiam decision held that a bus driver who required a Negro passenger to change seats in accordance with state laws was enforcing the state law and thereby engaging in state action. South Carolina by statute constituted drivers of buses police officers. The Court further ruled that the bus company could be subjected to a damage suit, since the driver of the bus acted for the bus company. This case is reported in 1 Race Rel. L. Rep. 183 (1956).

X. State Action May Include State Inaction

Suggestive in the foregoing problems is the question whether state inaction in not prohibiting discriminatory practices constitutes state action within the constitutional prohibition. Within this line of thought is *Catlette v. United States*, 132 F.2d 902, (4th Cir. 1943), which upheld the conviction of an officer who abandoned his duties while a mob committed assaults and batteries on Jehovah's Witnesses. Judge Dobie, for the Court of Appeals, said:

> "It is true that a denial of equal protection was better to have been largely confined to affirmative acts of discrimination. The Supreme Court, however, has already taken the position that culpable official State inaction may also constitute a denial of equal protection." 132 F.2d at 907.

The Court of Appeals cited in support of this proposition only two cases: (1) *McCabe v. Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151, 35 S.Ct. 69, 59 L.Ed. 169 (1914) and (2) *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938). Actually, the former case upheld the separate-coach law of Oklahoma, which provided for substantially equal but separate railroad accommodations for each race. See Separate-But-Equal Concept, 1 Race Rel. L. Rep. 283, 285 (1956). The second case held that Missouri must admit Negroes to the state university law school, in the absence of providing equivalent facilities for Negroes within the state. See Separate-But-Equal Concept, 1 Race Rel. L. Rep. 283, 287 (1956).

In *Lynch v. United States*, 189 F.2d 476 (5th Cir. 1951) officers arrested Negroes and detained them; other persons seized the Negroes, took them away, and beat them. The officers failed to afford the Negroes any protection. The Court of Appeals upheld the convictions of the officers, and said:

> "There was a time when the denial of equal protection of the laws was confined to affirmative acts, but the law now is that culpable official inaction may also constitute a denial of equal protection." 189 F.2d at 479.

The problem of whether a corporation is engaged in governmental action as a result of the government's tacit approval of the acts of the corporation has been suggested in a non-racial context in the captive-audience decision, *Public Utilities Commission v. Pollak*, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068 (1951). The Court of Appeals, 191 F.2d 450 (D.C. Cir. 1951), through Judge Edgerton declared that the projection by a bus company of music and advertisements on the persons being transported by the company, violated the Fifth Amendment by depriving passengers in the District of Columbia of their liberty without due process of law. The Court of Appeals found federal action in the fact that the government granted the public streetcar company the right to operate and sanctioned, at least by inaction, the activity to which objection was made. Judge Edgerton quoted Chief Justice Vinson in *Communications Assn. v. Douds*, 339 U.S. 382, 401, 70 S.Ct. 674, 685, 94 L.Ed. 925 (1950):

> "When authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes clearly akin, in some respects, to its exercise by Government itself."

The United States Supreme Court however, reversed the Court of Appeals, holding that listeners had not been deprived of their constitutional rights, even assuming governmental action. Mr. Justice Black, dissented.

XI. State Action May Include Actions of Lessees from the State

The Supreme Court followed the *School Segregation Cases* by prohibiting segregated public recreational facilities on the basis of race, even if the separate facilities are equal. *Mayor & City Council of Baltimore v. Dawson*, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed._____(1956). See *Dawson v. Mayor & City Council of Baltimore*, 220 F.2d 386 (4th Cir. 1955), 1 Race Rel. L. Rep. 162 (1956). Prior to the *Dawson* decision the question was not whether the Fourteenth Amendment reached state and city-owned recreational centers; instead, the question was whether equal facilities were provided. See *Rice v. Arnold*, 340 U.S. 848, 71 S.Ct. 77, 95 L.Ed. 621 (1950). *Harris v. City of Daytona Beach*, 105 F.Supp. 572 (D.C.Fla. 1952); *Lawrence v. Hancock*, 76 F.Supp. 1004 (D.C. W. Va. 1948); *Durkee v. Murphy*, 181 Md. 259, 29 A.2d 253

(1943). A remaining question concerns the extent to which the rules applicable to state agencies will be applied to private persons or corporations that rent from state agencies. Or to put the question differently, does a lease from a city to a corporation cause the acts of the corporation to become state action within the meaning of the amendments?

In *Tate v. Department of Conservation and Development*, 133 F.Supp. 53, 1 Race Rel. Law Rep. 171 (1955), Negroes brought a class action to enjoin the Department of Conservation and Development, a Virginia state agency, from denying them equal admission to state parks. The Court found that the proposed lease was negotiated in order to place the operation of the parks in the hands of a small group and to accomplish by indirection what could not be done directly. The Court quoted from an earlier case:

> "The power to lease does not include the power to discriminate against members of a minority race in the exercise of their constitutional rights." 133 F.Supp. at 59.

The Court concluded that an injunction should issue to the State and that

> "it will contain a provision that if said Park or any part thereof is leased, the lease must not, directly or indirectly, operate so as to discriminate against the members of any race." 133 F.Supp. at 61.

In *Kern v. City Commissioners of Newton*, 151 Kan. 565, 100 P.2d 709 (1940), the facts showed that a city had built a swimming pool and then leased it to private persons. The State Supreme Court though indicating that the lease did not necessarily relieve the city or permit the exclusion of Negroes, refused to issue a writ of mandamus in favor of the Negro plaintiff since he had never presented himself at the pool to demand admission.

A 1944 Illinois case, *Lincoln Park Traps v. Chicago Park Dist.*, 323 Ill. App. 107, 55 N.E.2d 173 (1944), though not involving the question of alleged racial discrimination, employs bold language in setting out the constitutional limitations on cities to lease publicly-owned property. In that case, the Chicago Park District, an agency of the city, leased property for trap shooting to a private corporation, which in turn improved the property at considerable expense, paid a nominal rental to the city, and established rules for the use of the facilities that drew distinctions between members and non-members of the club, including the use of lockers, and the assessment of fees. Reviewing earlier Illinois holdings, the Court quoted:

> "It cannot be questioned that a lease of public premises to private individuals for private purposes is the exercise of a control over such premises by the city inconsistent with their use as public property. The very nature of a lease precludes the use of the premises by the public and gives to one individual the exclusive right to possess and control the same." 55 N.E.2d at 55, 56.

The Illinois court invalidated the lease. Similarly in *Davis v. City of Atlanta*, 84 Ga. App. 572, 66 S.E.2d 188 (1951), the Georgia Supreme Court found the city liable for loss incurred in a park leased by the city to a private corporation which was managed by city officials.

Muir v. Louisville Park Theatrical Association, 202 F.2d 275 (6th Cir. 1953) affirming, 102 F.Supp. 525 (D.C.W.D.Ky. 1951), vacated and remanded, 347 U.S. 971, 74 S.Ct. 783, 98 L.Ed. 1112 (1954), sustained a federal district court in holding that Negro complainants should be allowed admission to city golf courses and fishing areas, since these governmental agencies had not provided facilities for Negroes. Of more importance to a study of state action was the question involving the leasing by the City of Louisville of a amphitheater erected by funds contributed both by the city and by a private corporation. The city leased the amphitheater to a private association for several weeks during the summer. Under the terms of the lease the city received the profits, reserved the right to make and enforce rules and regulations providing for good order, agreed to maintain the structure and equipment in a clean condition, and required the association to furnish an audited statement of income and expenses. During the period of the lease, the association denied to Negroes admission to its summer programs. The court held that the complaint was without merit, since there was no showing that the city had discriminated against Negroes by denying them the privilege of also leasing the amphitheater. The *Muir* case was reversed, however, by the United States Supreme Court for consideration in the light of the *School Segregation Cases*.

In *Lawrence v. Hancock*, 76 F.Supp. 1004 (D.C.W.Va. 1948), the Court held that a city could not operate a pool which excluded nonwhites, and added:

> "Having set up the swimming pool by authority of the legislature, the City, if the pool is operated, must operate it itself, or, if leased, must see that it is operated without such discrimination." 76 F.Supp. at 1009.

The court found that the association was a mere agent through which the city operated the pool; it then concluded that the refusal of the lessee, a private association, to admit a Negro was governmental action, not private action. The Court indicated that, as in the case of *Harris v. St. Louis*, 233 Mo. App. 911, 111 S.W.2d 995 (1938), had the city merely leased the pool for a short time to groups that excluded Negroes and at other times leased the pool to Negro organizations, a different result might have been reached. The St. Louis Court of Appeals in the *Harris* case had held that the city could rent the building when not needed by the city to private operators, who in turn could regulate the admission of persons to the hall; such circumstances did not constitute state action.

The Court of Appeals of Ohio ruled in *Culver v. City of Warren*, 84 Ohio App. 373, 83 N.E.2d 82 (1948) that a corporation formed for the purpose of leasing a municipal pool on a non-profit basis made the corporation a mere instrumentality of the city. In that case the corporation excluded Negroes through the device of a secret ballot for membership taken by the executive members of the corporation. The court held that a decree should enter including injunctive relief against both the city and the corporation restraining them from denying Negro plaintiffs admission to the pool "so long as such swimming pool remains the property of the City of Warren." 83 U.S. at 93.

On the other hand, *Easterly v. Dempster*, 112 F.Supp. 214 (E.D.Tenn. 1953) absolved the city from responsibility for discriminatory action by a corporation having a golf course by a lease fair on its face which had been executed for purely financial reasons.

XII. State Action May Include Action of Private Organizations Receiving State Aid

The problem of state action vis-a-vis a private housing corporation was considered at length in a four-to-three decision by the New York Court of Appeals in *Dorsey v. Stuyvesant Town Corporation*, 299 N.Y. 519, 87 N.E.2d 541 (1949), cert. denied, 339 U.S. 981, 70 S.Ct. 1019, 94 L.Ed. 1385 (1950). Negroes sought to enjoin a private building corporation and a large insurance company from segregation in apartment houses. The housing project, known as Stuyvesant Town, was organized under the New York Redevelopment Law. Under that law, the Town, with funds from its parent organization, the Metropolitan Insurance Company, acquired a number of blocks in the City of New York that had been condemned by the city. The Town, through the Metropolitan Insurance Company, spent $90,000,000 on the project from funds held for the benefit of the policyholders of the insurance company. The State of New York, in addition to providing the statutory apparatus through which the Town acquired the property, granted the Town a twenty-five year tax exemption. The New York Redevelopment Law did not impose any restrictions on the choice of tenants. Stuyvesant Town, as landlord, refused to rent units to Negro tenants, whereupon Negro plaintiffs commenced action in the state courts.

The issue as put by the New York Court of Appeals was:

> "[Plaintiffs] contend that [Stuyvesant Town and Metropolitan Insurance Company] are subject to the restraints of the equal protection clause of the State and Federal Constitutions and that in their selection of tenants they cannot lawfully discriminate against Negroes. . . . Since the constitutional provisions referred to impose restraints on State action only, and not on private action, the precise question to be decided is whether Stuyvesant and Metropolitan in the circumstances of this appeal are subject to the constitutional limitations applicable to State action." 87 N.E.2d at 542.

The Court of Appeals stated the state constitutional problem was the same as the one arising under the federal constitution. As put by the majority, in explaining the claims made by the Negro plaintiffs to support the argument that the discrimination resulted from "state action":

> "They point to the acknowledged contribution made by government to the project—principally the tax exemption amounting to many millions of dollars, and aggregation of the land through use of the city's power of eminent domain and through exchange of bordering tracts for city streets which had

been closed. Moreover, we are urged to consider the size of the project as in reality forming a large community within the city." 87 N.E.2d at 550.

In answering the foregoing contentions, the majority opinion stressed that the state legislature had not set the policy of exclusion, that tax exemption and eminent domain are given to many organizations, and that these benefits have never been held to violate the Fourteenth Amendment. The majority concluded:

"The aid which the State has afforded to [Stuyvesant Town and the insurance company] and the control to which they are subject are not sufficient to transmute their conduct into state action under the constitutional provisions here in question." 87 N.E.2d at 551.

Dissent

Three of the seven judges dissented; in part their opinion reads:

". . . even the conduct of private individuals offends against the Constitutional provision if it appears in an activity of public importance and if the State has accorded the transaction either the panoply of its authority or the weight of its power, interest and support.

". . . Unmistakable are the signs that this undertaking was a governmentally concerned, governmentally aided and governmentally regulated project in urban redevelopment. Everywhere in evidence are the voice and authority of the State and the City. Approval of the underlying constitutional housing article set in motion numerous governmental acts necessary to accomplish the 'reconstruction and rehabilitation' of slum areas and to provide 'incidental facilities' . . . and it was to achieve all these ends—not merely the clearance of a slum area—that the plans for Stuyvesant Town were conceived and executed, that the City condemned property for use by defendants, closed public streets and turned over their land area—comprising 19% of the total area of the project—granted tax exemption upon improvements and insisted upon regulation of the rents, profits and financing methods of the redevelopment corporation.

"In addition, there is the exceedingly significant fact that the City's Board of Estimate approved and authorized the contract for the construction and operation of Stuyvesant Town after having been apprised by city representatives and company officials that Negroes would be excluded from the development. Beyond that, the City Council deliberately excepted Stuyvesant from the coverage of the law, subsequently enacted, which barred racial discrimination in tax-exempt projects." 87 N.E.2d at 555, 556.

The three dissenting justices would have ordered the admission of Negroes to the housing project.

Girard College Case

In re Estate of Stephen Girard, Phila. County, Pa., Orphans Ct. July 29, 1955, 1 Race Rel. L. Rep. 326 (1956) affirmed *en banc*, Phila. County, Pa., Orphans Ct. Jan. 6, 1956, 1 Race Rel. L. Rep. 340 (1956) contests a clause in the trust created by the will of Stephen Girard to "The mayor, alderman and citizens of Philadelphia" for the establishment of a college for the education and maintenance of "poor white male orphans." Two otherwise qualified Negroes sought admission to the College and upon their rejection petitioned the Orphans Court in Philadelphia to direct the Board of Directors of City Trusts to show cause why they were not admitted. The Board answered by asserting its duty, under the terms of the charitable trust, which it administered, to deny admission to the applicants because they were not "poor white male orphans." The Negro youths complained that the action of the Board in refusing their admission solely on account of color was state action within the Equal Protection Clause of the Fourteenth Amendment, and therefore unconstitutional. Since its beginning, the Girard trust has been administered by an agency of government, first by the legislative branch of the city government, later, by virtue of a state statute, under the present Board of Directors of City Trusts. The membership of the Board consists of the Mayor and the President of the City Council and other members of the community, who are appointed by county judges. No member receives compensation. The Orphans Court held that the operation of the trust is not state action, emphasizing that the property involved is private as are the funds administered by the Board. The rationale seems to be that the city acts in a proprietary rather than a corporate manner. The Court defined the Board's interest as that "of bare legal title holder and administrative agent;" stated that tax exemption given to this charity is the same as given to all others; and then said:

"It is clear on this record and from the decided cases that in no sense does the Board,

in the administration of the trust, nor the City Treasurer in the handling of the funds, exercise any governmental powers and, therefore, the administration of the trust does not come within the realm of state action forbidden by the Fourteenth Amendment."

Further analysis was given the case before the full court, which said:

"Exceptants argue that the City of Philadelphia, as 'a governmental body even when it acts in its fiduciary or proprietary capacity is subject to the constitutional restrictions required by the Fourteenth Amendment. Therefore, any governmental agency is unable to remain as trustee if racial exclusion is continued at Girard College.' This is novel doctrine. . . The fallacy in exceptants' position is their contention that Girard College should be regarded as a public school. It is not . . .

"The City of Philadelphia, in its governmental capacity, does not provide any one with the opportunity to attend Girard College. The City offers no privileges and grants no rights. Like all corporations, municipal and private, it derives its authority to act as a corporation from the State. However, the City simply performs the duties of a trustee. . . The City acts because of its fiduciary power and duties; not because of any state function of power."

The case of *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945), cert. denied, 326 U.S. 721, 66 S.Ct. 26, 90 L.Ed. 427 (1945) involved the problem of whether discrimination by a library constitutes state action within the mandate of the Fourteenth Amendment. In that case the Court sustained a prayer for damages and injunctive relief brought by a Negro plaintiff under the Civil Rights Acts, adjudging that state action was involved. The library, although originally a charitable foundation, obtained financial aid from the city. Moreover, the city owned the real and personal property involved, audited its accounts, and established rules for the appointment of trustees.

A different result was reached by a United States District Court in *Norris v. Mayor and City Council of Baltimore*, 78 F.Supp. 451 (1948). The Court characterized an art school as a private and non-state instrumentality and denied relief to a Negro complainant who had been refused admission to the school on account of race. The school received a subsidy from the state and city representing about twenty-three percent of its total income. In return, the school permitted state senators and city council members to appoint students to the school who would receive free tuition. The Court considered the feature of greatest significance to be that the management of the school was free from public control and concluded that the actions of the management were not state action within the constitutional limitations.

XIII. State Action May Include The Action of Private Organizations that Perform Quasi-Governmental Functions

Election Cases

As regards voting and elections, this Study earlier considered those cases in which the Supreme Court invalidated state statutes that discriminated against persons on account of race. Other cases arose to test the devices employed by political parties and organizations that involved racial discrimination but that did not involve state statutory approval of the discrimination. In *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932), a Negro brought a civil action in federal court by virtue of the Civil Rights Acts, against Texas election officials who refused to give him a ballot to vote in the Democratic primary elections. Texas had repealed its statute prohibiting the right of the Negro to vote in the primary, but had enacted legislation that permitted every political party to prescribe the qualifications of its own members and to determine who could vote in its party elections. Mr. Justice Cardozo for the Court ruled that the State Executive Committee of the Democratic party acted under the authority of the state and that the action was state action violative of the Equal Protection Clause of the Fourteenth Amendment. Four Justices dissented.

In *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944) the Supreme Court again ruled that Negroes cannot be denied the right to vote in state primaries, since even in the absence of a statute sanctioning private rules by political organizations, these parties were subject to the statutory control of the state.

The rationale of *Smith v. Allwright* was followed by the Court of Appeals, Fourth Circuit,

in *Rice v. Elmore*, 165 F.2d 387 (1947); cert. denied, 333 U.S. 875, 68 S.Ct. 905, 92 L.Ed. 1151 (1948). In that case, the Court denied the exclusion of the ballot to Negroes even though the Democratic party was constituted as a private club. Not drawing validity from state statutes, the elections were not held under state law, since South Carolina had repealed all legislation pertaining to primary elections; but the names of nominees from the private elections were placed on the state ballot as Democratic nominees.

The furthest extension of state action to elections occurred in *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1952). There an organization in Texas known as the Jaybirds held pre-primary elections to determine their candidates for state primaries and general elections. Membership in the Jaybird organization was restricted to white persons. Negroes sought a declaratory judgment that their exclusion from the pre-primary Jaybird election violated the United States Constitution. The Supreme Court, over Mr. Justice Minton's dissent, found this discrimination to be state action within the meaning of the Fifteenth Amendment; however, the Court split as to its reasons for this conclusion. Mr. Justice Black, in an opinion joined by Justices Douglas and Burton, construed state action to mean state responsibility and concluded that in this instance the state had permitted an illegal device. Mr. Justice Frankfurter found that county election officers had participated in the Jaybird election and that such participation constituted state action. Mr. Justice Clark, with whom Mr. Chief Justice Vinson and Justices Reed and Jackson joined, found state action in that the Jaybird Party operated as "part and parcel of the Democratic party, an organization existing under the auspices of Texas law. . ." Mr. Justice Minton found no state action.

Privately Owned Towns

Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) resembles the Jaybird Party case in that the discriminatory actions in both were claimed to be actions of private organizations; the United States Supreme Court, however, held the actions to be the actions of the states. In the *Marsh* case, a Jehovah's Witness attempted to spread literature in a company-owned town. She was convicted in Alabama courts for remaining unlawfully on private property. The Supreme Court, three justices dissenting, held that the state could not enforce its statute against trespass to the extent that they limit free speech, even in company-owned towns. The Court relied on *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938), which had held that neither a state nor a municipality could forbid the distribution of religious literature on streets, sidewalks, and public places. The same held true, according to the *Marsh* decision, for a privately-owned town.

Federal Analogies from Labor Cases

Two cases involving alleged discrimination by labor unions are possibly relevant toward reaching a definition of state action with regard to organizations accorded quasi-governmental status. In *Steele v. Louisville & Nashville R. R.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944), the Supreme Court held that a railroad labor union, authorized by Congress to be the exclusive bargaining representative for a craft of employees, could not in its negotiations discriminate on the basis of race against other employees who were members of the craft but not of the union. The decision rests on the notion that the union, in deriving its power to negotiate from Congress, must operate within the framework of the Fifth Amendment.

Six years later, in *Brotherhood of Railway Trainmen v. Howard*, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952), the Court approved the issuance of an injunction against members of a union composed entirely of white persons that discriminated against Negro members of another craft. There were three dissents in this case. Speaking for the dissenters, Mr. Justice Minton said:

> "I do not understand that private parties such as the carrier and the Brotherhood may not discriminate on the ground of race. Neither a state government nor the federal government may do so, but I know of no applicable federal law which says that private parties may not." 343 U.S. at 778.

The dissent sought to distinguish the *Steele* case in which a statute imposed a duty on the negotiators to represent the persons against whom they discriminated; in *Brotherhood of Railway Trainmen*, the statute did not charge the trainmen to represent the railway porters, who al-

leged the discrimination. See also *James v. Marinship Corp.*, 25 Cal.2d 721, 155 P.2d 329 (1944) and *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1940), in which state courts achieved similar results.

The pertinence of the *Steele* case was urged in *Dorsey v. Stuyvesant Town Corporation, supra.* Although the majority opinion in the latter case indicates its understanding of *Steele* to mean that private groups are subject to constitutional restraints when "they perform functions of a governmental character in matters of great public interest", 87 N.E.2d at 549, the Court found that the aid from the state to the housing corporation did not constitute state action. The minority opinion also cited *Steele* with approval and added that private groups or corporations do not need a formal delegation of powers to come under constitutional disability. For the latter proposition, the minority relied on the *Jaybird Primary* case.

The Supreme Court has recently taken action indicating that the limitations on collective bargaining by labor unions enunciated in the *Steele* and *Howard* decisions are generally applicable to labor organizations certified under the National Labor Relations Act. *Syres v. Oil Workers International Union*, 350 U.S. 892, 76 S.Ct. 152, 1 Race Rel. L. Rep. 20 (1955).

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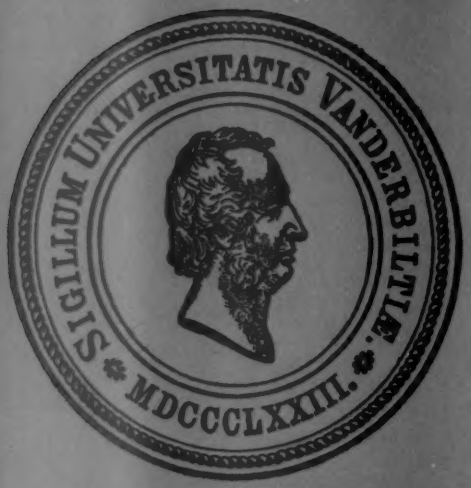
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